THE

ALL INDIA REPORTER

1933

BOMBAY SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF

THE BOMBAY HIGH COURT.

REPORTED IN

(1) I. L. R. 57 BOMBAY (2) 35 BOMBAY LAW REPORTER

(3) 19 & 20 ALL INDIA CRIMINAL REPORTS

(4) 34 CRIMINAL LAW JOURNAL (5) 141 TO 146 INDIAN CASES

(6) 1933 CRIMINAL CASES

CITATION : A. I. R. 1933 BOMBAY

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NAGPUR, C. P.

1933

To

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

BOMBAY HIGH COURT

1933

Chief Justices :

The Hon'ble Sir John William Fisher Beaumont, Kt., K. C., M. A., (Cantab.), Bar-at-law.

" Mr. William Thomas Webb Baker, B.A., (Oxon), I. C. S., (*Offg.*).

Puisne Judges :

The Hon'ble Mr. Mirza Ali Akbar Khan, Bar-at-law.

" " Cecil Patrick Blackwell, M.B.E., B.A., (Oxon.), Bar-at-law.

" " Sitaram Sunderrao Patkar, B.A., LL.B.

" " William Thomas Webb Baker, B.A. (Oxon), I.C.S.

" " Stephen James Murphy, I. C. S.

" " Sajba Shankar Rangnekar, B.A., LL.B., Bar-at-law.

" " Robert Stonehouse Broomfield, B.A., (Cantab.), Bar-at-law, I.C.S.

" " Kenneth William Barlee, B.A., (Dublin), Bar-at-law, I.C.S.

" " Bomanji Jamshedji Wadia, Bar-at-law.

" " Harilal Jaykisandas Kania, B.A., LL.B.

" " Faiz Badruddin Tyabji, M.A., Bar-at-law, (*Offg.*).

" " Padmanabh Bhaskar Shingne, B.A., LL.B., (*Offg.*)

" " N. J. Wadia, B.A., (Bom. & Cantab.), Bar-at-law, I.C.S. (*Offg.*)

" " Harsidhbhai Vajubhai Divatia, M. A., LL.B., (*Addl.*).

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34 Criminal Law Journal and 141 to 146 Indian Cases=All India Reporter
Please refer to COMPORATIVE TABLE NO. I *in A I R* 1933 *Lahore*

1933 Criminal Cases=All India Reporter
Please refer to COMPARATIVE TABLE NO. I *in A I R* 1933 *Nagpur.*

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N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER 1933 BOMBAY. Column No. 2 denotes corresponding references of OTHER JOURNALS.

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	34 *Cr L J*	865
230	35 *B L R*	371
	1933*Cr C*	653
	145 *I C*	133
	34 *Cr L J*	896
233	35 *B L R*	484
	1933*Cr C*	656
	144 *I C*	922
	34 *Cr L J*	878
	20 *A I Cr R*	343
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	57 *Bom*	601
244	35 *B L R*	413
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	145 *I C*	286
245	35 *B L R*	388
	145 *I C*	164
251	35 *B L R*	415
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252	35 *B L R*	471
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	144 *I C*	990
253	35 *B L R*	368
	144 *I C*	277
255	35 *B L R*	432
	57 *Bom*	388
260	35 *B L R*	458
	144 *I C*	916
262	35 *B L R*	404
	144 *I C*	781
266	35 *B L R*	474
	1933*Cr C*	678
	57 *Bom*	400
	144 *I C*	985
	34 *Cr L J*	870
	20 *A I Cr R*	332
270	35 *B L R*	410
	145 *I C*	273
272	35 *B L R*	397
	57 *Bom*	377
	144 *I C*	925
276	35 *B L R*	440
	145 *I C*	190
287	35 *B L R*	418
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287	145 *I C*	262
296	35 *B L R*	581
	145 *I C*	578
297	35 *B L R*	573
	145 *I C*	581
298	35 *B L R*	588
	145 *I C*	582
303	35 *B L R*	578
	144 *I C*	754
304	35 *B L R*	569
	147 *I C*	786
306	35 *B L R*	604
	146 *I C*	165
307	35 *B L R*	384
	1933*Cr C*	894
	145 *I C*	161
	34 *Cr L J*	900
309	35 *B L R*	546
	57 *Bom*	665
	145 *I C*	648
313	35 *B L R*	576
	145 *I C*	405
314	35 *B L R*	583
	145 *I C*	408
317	35 *B L R*	554
	145 *I C*	641
	58 *Bom*	1
324	35 *B L R*	643
	57 *Bom*	737
338	35 *B L R*	694
	1933*Cr C*	915
	57 *Bom*	699
	146 *I C*	616
342	35 *B L R*	700
	146 *I C*	621
347	35 *B L R*	606
	146 *I C*	168
348	35 *B L R*	640
	147 *I C*	412
350	35 *B L R*	615
	57 *Bom*	507
	146 *I C*	340
353	35 *B L R*	599
355	35 *B L R*	775
	145 *I C*	769
358	35 *B L R*	769
	145 *I C*	773
	57 *Bom*	616
361	35 *B L R*	763
364	57 *Bom*	468
	35 *B L R*	620
	146 *I C*	343
367	35 *B L R*	795
	57 *Bom*	513
	145 *I C*	792
369	35 *B L R*	761
370	35 *B L R*	708
374	35 *B L R*	715
	145 *I C*	563
377	35 *B L R*	625
	146 *I C*	329
381	35 *B L R*	722
	145 *I C*	557
386	35 *B L R*	779
	145 *I C*	780
396	35 *B L R*	609
	57 *Bom*	641
	146 *I C*	336
398	57 *Bom*	456
	35 *B L R*	630
404	35 *B L R*	840
	147 *I C*	579
407	35 *B L R*	881
	145 *I C*	619
409	35 *B L R*	845
	1933*Cr C*	1173
	57 *Bom*	690
	146 *I C*	688
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	146 *I C*	162
	34 *Cr L J*	1257
413	35 *B L R*	850
	57 *Bom*	678
417	57 *Bom*	537
FB	35 *B L R*	886
	146 *I C*	248
	1933*Cr C*	1289
	34 *Cr L J*	1239
422	35 *B L R*	914
	57 *Bom*	651
	147 *I C*	566
427	57 *Bom*	519
	35 *B L R*	896
	147 *I C*	370
433	35 *B L R*	941
	147 *I C*	587
436	35 *B L R*	950
	145 *I C*	588
437	35 *B L R*	946
	146 *I C*	984
438	35 *B L R*	884
	1933*Cr C*	1330
	146 *I C*	472
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	146 *I C*	979
445	35 *B L R*	952
	147 *I C*	770
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447	1933*Cr C*	1406
	146 *I C*	587
	35 *Cr L J*	112
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450	35 *B L R*	929
	145 *I C*	630
457	35 *B L R*	1033
FB	146 *I C*	11
460	35 *B L R*	1027
FB	146 *I C*	6
461	35 *B L R*	1018
FB	146 *I C*	1
	1933*Cr C*	1420
	58 *Bom*	37
462	35 *B L R*	981
	1933*Cr C*	1421
	146 *I C*	807
465	35 *B L R*	1007
	147 *I C*	354
469	35 *B L R*	998
	147 *I C*	362
475	35 *B L R*	1015
	147 *I C*	360
476	35 *B L R*	965
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	58 *Bom*	31
	146 *I C*	548
	35 *Cr L J*	109
482	35 *B L R*	1040
	1933*Cr C*	1586
	58 *Bom*	40
	147 *I C*	25
485	35 *B L R*	1054
	1933*Cr C*	1589
	58 *Bom*	49
489	35 *B L R*	1046
	1933*Cr C*	1593
	147 *I C*	43
492	35 *B L R*	1072
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Emperor v. Housabai, (1932) 56 Bom. 542 =34 B. L. R. 1240=1932 Cr. C. 785= A. I. R. 1932 Bom. 553=140 I C 740	Overruled in A.I.R. 1933 Bom. 145 (F.B.).
Ishwar Dadu v. Gajabai, (1926) 50 Bom. 468=28 B. L. R. 782=A. I. R. 1926 Bom. 435=96 I. C. 712 (F. B.).	" " 1933 P. C. 1.
Limbaji Raoji v. Rahi Raoji, (1925) 49 Bom 576=27 B. L. R. 621=A. I. R. 1925 Bom. 499=88 I. C. 643.	" " 1933 Bom. 15. (F. B.).
Ramji v. Ghamau, (1879) 6 Bom. 498 (F. B.).	" " 1933 P. C. 1.
Shankar Baji v. Kashinath Ganesh, (1927) 51 Bom. 194=29 B. L. R. 1=A. I. R. 1927 Bom. 97=100 I. C. 430 (F. B.).	Impliedly Overruled in A. I. R. 1933 P. C. 141.
Vinayak Rao Amrit v. Dev Rao Govind, (1887) 11 Bom. 473.	" " 1933 Bom. 457 (F.B.).
Vithalrao v. Ramrao, (1900) 24 Bom. 317 =2 B. L. R. 139.	Impliedly Overruled in A. I. R. 1933 P. C. 141.

Between January and May the defendants continued to take delivery of portions of the goods as suited their convenience, and on twelve separate occasions they took delivery of bales packed before the date of the contract. They never told the plaintiffs that they would repudiate the appropriation on this ground and the plaintiffs continued to hold the goods to the order of the defendants. In my opinion the conduct of the defendants amounted to a representation to the plaintiffs that they would not repudiate the appropriation on the ground that some of the goods were packed before the date of the contract, and the plaintiffs acted upon this representation by continuing to hold the goods. On this point therefore I arrive at the same conclusion as the learned trial Judge, but I rely on estoppel and not on evidence of express waiver. In my opinion the appeal fails and must be dismissed with costs.

Mirza, J.—The two main questions which arise for determination in this appeal are : (1) Whether the appellants have rightly repudiated their contract dated 3rd October 1929, in respect of 95 out of 125 bales of Satin known as Gangaghat on the ground that the 125 bales of Satin Gangaghat which were comprised in the contract and of which these 95 bales formed a part were to be manufactured and supplied to them in accordance with a basic sample, which is Ex. 3 in the suit, and that the 95 bales are not in accordance with such sample; and (2) Whether the appellants were justified in repudiating the contract in respect of the 95 bales of Satin Gangaghat on the ground that 13 out of the 95 bales supplied or tendered to them were not of the contract description as they were not manufactured between November 1929 and January 1930 as stipulated in the contract. The repudiation by the appellants under the first head was by their attorneys' letter dated 23rd September 1930, part of Ex. G collectively ; and the repudiation by them under the second head was by their supplemental points of defence filed in this suit on 13th March 1931, after the appellants had taken a survey of the goods under an order of the commercial Judge dated 3rd February 1931. (His Lordship after considering the evidence on the first point and holding against the appellants proceeded.)

With regard to the second point, it is conceded by the respondents that 13 bales out of the 95 bales are not of the contract description as they were manufactured and packed prior to November 1929. The respondents however urge that the appellants were aware that some of the goods appropriated to the contract were not of the contract description and had waived any objection they might have had on that ground. The evidence of Monji Kallianji on this point is as follows :

> " The plaintiffs (meaning the defendants-appellants) knew that some of the goods were manufactured before the date of the contract."

The learned trial Judge has believed this evidence of Monji Kallianji and has held that the appellants knew that some of the goods out of those appropriated to the contract were manufactured before the date of the contract and had waived any objection on that ground. From Ex. D it appears that on 25th January 1930, the appellants took delivery of one bale of Satin Gangaghat on which the date of packing was 4th January 1928. Again on 28th January 1930, the appellants took delivery of a bale which was packed on 9th January 1928. The appellants' attention must have been called at the time to the date of packing which these bales bore. Chunilal's denial to the contrary has not been believed by the learned Judge. Subsequent to 31st January 1930, the appellants on various dates took delivery out of the stock set apart for them of various bales including 13 bales of Satin Gangaghat which had been packed prior to November 1929 and did not at the time raise an objection to any of these 13 bales on the ground that they were not of the contract description. It is difficult to believe that the appellants were ignorant of the dates on these 13 bales. On 3rd February 1931, the appellants obtained an order from the commercial Judge by which they were given liberty to survey the goods, the subject-matter of this suit. After the survey was taken by the appellants they obtained leave on 13th March 1931, from the commercial Judge to file supplemental points of defence, and in pursuance of the leave so granted the appellants filed their supplemental points of defence raising for the first time the further defence that they were not liable to pay for and take delivery of the remain-

ing 95 bales as 13 bales out of them were found to be not of the contract description. In granting leave to the appellants to file supplemental points of defence, the learned commercial Judge ordered the respondents to file a reply to the supplemental points of defence, but the respondents have failed to comply with that order. If the respondents were relying on waiver by the appellants, they ought clearly to have pleaded it by means of a further reply. At the hearing before the learned Judge no issue was raised on the point of waiver, but evidence was allowed to be led and the matter has been dealt with by the trial Judge in his judgment.

The question of waiver on the part of the appellants seems to me to be closely connected with the question as to the appropriation of the remaining goods to the contract on 31st January 1930. (His Lordship after considering facts and evidence proceeded). With regard to the appropriation of the goods to the contract the effect of Ex. E, in my opinion, is that certain goods purporting to be of the contract quality and description were appropriated by the respondents in the first instance to the contract and the appellants were invited to take delivery of those goods. Thereafter the goods remained with the mills acting on behalf of the appellants as their bailees. The respondents have not satisfactorily proved that they actually set apart these goods in their mills. The onus to prove this was on them and they have failed to discharge it. But the effect of Ex. E, in my opinion, is that there was a notional setting apart of the goods which was assented to by the appellant. The respondents in effect represented to the appellants that the remaining goods under the contract were ready for delivery and called upon the appellants to take delivery of them. The appellants accepted that position and must be deemed to have taken delivery of the goods described in Ex. E in respect of which they constituted the respondents their bailees for holding the goods on their behalf.

The contract was in respect of goods which were to be manufactured by the mills. The contract was entered into by the appellants with respondent 2 but respondent 2 firm were contracting as the agents of a disclosed principal, viz., respondent 1. In the absence of a contract to the contrary the place for delivery in such a case would be the place where the goods were manufactured. Under S. 93, Contract Act, in the absence of a special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery. Nonetheless the respondents took the initiative in offering to deliver the goods on the due date. Under S. 94, Contract Act, in the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale; or, if not then in existence, at the place at which they are produced. Mr. Bahadurji has relied upon the evidence of Monji Kallianji to show that the practice was for the appellants to apply to respondent 2 for delivery of bales as and when they required them; respondent 2 would then send for these bales from the mills and send a delivery order in respect of them to the appellants on respondent 2's godown keeper. The delivery order given in respect of the remaining goods on 31st January 1930, being part of Ex. K, exemplifies that practice except that it comprises all the remaining bales. On this ground Mr. Bahadurji had contended that he was under no duty to examine the goods until they reached the place where he was bound to take delivery, that place being respondent 2's godown. In my judgment the appellants cannot now rely on this contention. By Ex. E they purported to take delivery of the goods although the goods were not then in respondent 2's godown, and agreed that those goods should continue to remain in the mills on their behalf.

Mr. Bahadurji next contends that the tender made on 30th January 1930, of the goods was not a valid tender. Twenty-four bales out of them were not of the contract description and in respect of those bales the tender could not be valid. Under S. 38, Contract Act, where there is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. Mr. Bahadurji has cited *Rylands* v.

Kreitman (3), *Reuter* v. *Sala* (4) and *Moore & Co. and Landauer & Co., In re* (5), as showing that where the sale of goods is by description, if the goods contracted to be sold are mixed with goods of a different description the buyer would be entitled to reject the whole consignment. It was undoubtedly the right of appellants on 31st January 1930 to have rejected the remaining Satin Gangaghat bales when the offer for delivery was made as they contained, as has subsequently transpired, twenty-four bales which were not of the contract description. In *Haridas Khandelwal* v. *Kalumull* (6) Sale, J., has held that if the right to reject the goods as being of an inferior quality is not exercised by the buyer when the goods are tendered, but a right of a proprietary character in respect of the goods is exercised by directing delivery to be made to third parties, then the buyer accepts the goods. In the present case it was the appellants' duty, in my opinion, to have ascertained on 31st January 1930 whether the goods were of the contract description. They did not do so, but exercised proprietary rights thereafter over the goods delivered to them. They constituted the respondents their bailees for holding these goods on their behalf. They exercised further proprietary rights over these goods by taking delivery of such part or portion of them from time to time as suited their convenience. It is not open to them to raise the contention that as some of the goods are not of the contract description they are now entitled to reject such of the bales as they have not disposed of. It is not open to the appellants, in my judgment after a lapse of time, when the market has gone against them, to claim that they can reject these goods.

Prior to 31st January 1930 the appellants, having taken delivery of some bales which were not of the contract description, can be deemed to have made a representation that they would not object to the goods on the ground that they were not manufactured during the contract period. It can be said that relying on that representation the respondents included in their tender of the remaining goods on 31st January 1930, twenty-four bales which were manufactured prior to the contract period. The appellants dealt with these remaining goods irrespective of their being of the contract description or not. By so dealing with the goods the appellants can in my judgment be said to have made a further implied representation to the respondents that they would not reject the remaining goods on this ground. The respondents have acted on the faith of that representation by having continued to hold the goods on behalf of the appellants until the market in those goods fell. The respondents have materially altered their position to their prejudice owing to this conduct on the part of the appellants. In my judgment the appellants are now estopped from contending that any part of the goods which remained on their account with the respondents was not of the contract description.

In the result, in my opinion, the appellants having failed on both points which were urged on their behalf, the appeal should be dismissed.

M.N. *Appeal dismissed.*

3. (1865) 19 C B (n s) 351.
4. (1879) 4 C P D 239=48 L J C P 492=40 L T 476=27 W R 671.
5. (1921) 2 K B 519=90 L J K B 731=125 L T 372=37 T L R 452=26 Com Cas 267.
6. (1903) 30 Cal 649=7 C W N 562.

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* A. I. R. 1933 Bombay 51

BEAUMONT, C.J. AND BLACKWELL, J.

Official Assignee of Bombay — Defendant 5—Appellant.

v.

Chimniram Motilal and *another* — Plaintiffs and Defendants — Respondents.

Original Civil Appeal No. 29 of 1931, Decided on 31st August 1932, against decision in Suit No. 1613 of 1930.

(a) Practice—High Court—Consent orders. Consent orders in chambers ought not to be made unless a summons is taken out [P 52 C 2]

(b) Civil P. C. (1908), O. 40, R. 1 — Order against receiver in another suit cannot be passed—Jurisdiction.

The Court has no jurisdiction to order a receiver in another suit to make payments to the plaintiff in a suit under trial for enforcement of charge on specific property and a fortiori to order those payments to be made out of the income of the property which is no part of the plaintiff's charge. [P 53 C 2]

* **(c) Civil P. C. (1908), O. 2, R. 2—Charge on moveable property — Personal judgment obtained—Security cannot be enforced by suit—O. 34, R. 14 does not apply — Rights are not extinguished and can be set up in defence—Civil P. C. (1908), O. 34, R. 14.**

A holder of a charge on moveable property having obtained a personal judgment for his debt cannot without the leave of the Court sue

to enforce his mortgage security. Such leave cannot be assumed. O. 34, R. 14, cannot apply as it relates to immovable property only. But his charge is not extinguished and he is entitled to all rights thereunder as defendant in a prior mortgagee's suit without himself suing to enforce them. [P 55 C 1]

(d) Interpretation of Statutes— Headings are preambles to sections—Preambles can be used to solve ambiguities in sections.

The headings prefixed to sections or sets of sections are preambles to those sections.

The preamble of a statute is a good means of finding out its meaning, and a key to the understanding of it, and as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words, which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt. But the preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt. [P 57 C 2]

N. P. Engineer and *M. L. Maneckshah*—for Appellant.

R. S. Billimoria, F. J. Coltman, M. G. Setalvad and *D. B. Desai*—for Respondents.

Beaumont, C. J. —This is an appeal by the Official Assignee as representing the estates of defendants 2 and 3, who are insolvents, from a decree passed by Rangnekar, but as it was an ex parte decree the matters which have been argued before us were not discussed before the learned Judge. Two objections are taken by the appellant to the decree; the first is against the plaintiffs in the suit, and the second is against defendant 6 in the suit who was a subsequent mortgagee. I will deal with the case against the plaintiffs first.

On 11th April 1930, the plaintiffs were given a pledge to secure Rs. 50,000 on machinery, types and other articles appertaining to a printing press known as Shri Venkateshvar Press, the pledgors being a firm called Khemraj Shrikissondas, who were the original defendants to the suit. On 1st August the plaintiffs commenced the suit to enforce their pledge. On 19th August another suit was commenced by the person who afterwards became defendant 4 in this suit—Murlidhar Shrinivas, who was an infant, the relief in his suit including a claim that the plaintiffs' mortgage was not binding on him. I will refer to that suit as defendant 4's suit. On 25th August an order was made in the present suit appointing one of the plaintiffs receiver and manager of the press. The order included a provision that the receiver was not to act as long as the defendants paid interest and instalments of principal as therein provided. I may point out in passing that the order seems to have been wrong in appointing a manager, because the plaintiffs' pledge did not include the business of the press, it only included certain assets of that business, and there was I think no case for the appointment of a manager. On 9th September the Court Receiver was appointed receiver of the press in defendant 4's suit, that order being made by consent. On the same day defendants 2 and 3 in the present suit were adjudicated insolvent. Shortly after that, the plaint in this suit was amended by the leave of the Court, and defendants 2, 3, 4 and 6 were added, and also the Official Assignee, defendant 5, as claiming through the insolvent defendants 2 and 3. On 7th October an order was made in this suit that the receiver appointed in defendant 4's suit should, among other things, pay Rs. 1,500 a month to the plaintiffs. Those payments were to be made out of the funds standing to the credit of the Shri Venkateshvar Press. That order again appears to be an order made without jurisdiction. I gather from the form of the order that it was a consent order made without any summons having been taken out, and I think that these consent orders in chambers ought not to be made unless a summons is taken out. If a summons had been taken out in this case the learned Judge's attention would have been drawn to the fact that he was being asked to order a receiver in another suit to pay certain moneys to the plaintiffs in this suit, and he would have appreciated that he could not do that without having the persons interested in the other suit before the Court.

However, that order was made, and no great harm was done, because on 11th November an order was made in defendant 4's suit which confirmed the payments directed to be made by the order in this suit of 7th October and directed such payments to be continued. There was another order made by consent in defendant 4's suit on 12th February 1931 which is not, I think, material, and then on 9th April the decree appealed from was made in this suit. By that decree it was declared that a sum of Rs. 11,497

odd was due to the plaintiffs together with certain costs, and then there was a declaration as to the amount due to defendant 6—I will refer to the facts relating to his position presently—and then there was provision for redemption by the plaintiffs and defendant 6 and a provision that the payments of Rs. 1,500 per month by the receiver appointed in defendant 4's suit should continue. Then there are provisions for the redemption of the charge in favour of defendant 6 and for sale at the instance of the plaintiffs if not redeemed, or of defendant 6 if not redeemed.

Now so far as the plaintiffs are concerned, the objection taken to the order is that these sums of Rs. 1,500 per month paid under orders of the Court out of moneys in the hands of the receiver in defendant 4's suit ought not to have been deducted, as they were from the amount due to the plaintiffs, and that therefore the sum of Rs. 11,497 odd declared to be due to the plaintiffs should in fact have been a greater sum. At first sight it is difficult to see why it is to the appellant's interest that the plaintiffs should have a greater sum found due to them than the sum they admit to be due but the contention of the appellant, representing the unsecured creditors of defendants 2 and 3, is that in fact these sums of Rs. 1,500 per month have been paid out of properties not subject to the plaintiffs' charge, and that they have really benefited the second incumbrancer, namely, defendant 6, and that in the result the unsecured creditors have lost by those payments. Therefore the appellant claims that the plaintiffs should be ordered to repay a part at any rate of these payments, and that although thereby their debt will increase, still they can only prove for any balance which may remain after realising their security. To my mind that claim is wholly untenable. The plaintiffs were paid these sums of Rs. 1,500 per month because they had a charge upon the machinery and assets which were being used by the receiver in defendant 4's suit to carry on the business, and if the plaintiffs had insisted on their legal rights, and obtained a receiver of that machinery and those assets, the business would have been paralysed; therefore the receiver in defendant 4's suit, no doubt with the concurrence of the parties in that suit, was prepared to pay this sum of Rs. 1,500 a month to the plaintiffs in reduction of their debt, and, the plaintiffs having received that sum, not from the insolvents, but from an officer of the Court who made the payments under orders of the Court, it seems to me quite impossible for this Court to order the plaintiffs to repay anything.

The only criticism I have to make on the decree, in so far as it affects the plaintiffs, is in respect of the provision that the receiver in defendant 4's suit is to continue to make payments with prejudice (whatever that means) out of the net income of the press towards satisfaction of the decretal amount and costs pursuant to the order of 7th October 1930. As I have already pointed out, I think the Court in this suit has no jurisdiction to order a receiver in another suit to make payments to the plaintiffs in this suit, and a fortiori to order those payments to be made out of the income of the press which is no part of the plaintiffs' charge. That part of the order, I think, is wrong and must be struck out.

I now come to the position of defendant 6, the point against him being quite distinct from that against the plaintiffs. On 29th May 1930, defendant 6 was given a form of charge, which is Ex. 1, on the Shri Venkateshvar Printing Press (such charge being subject to the plaintiffs' charge) in order to secure a sum of a lac of rupees which defendant 6 had guaranteed to the bank of the defendant firm. It is not disputed that that sum was subsequently paid by defendant 6, and therefore his security became effective. On 12th September 1930, defendant 6 obtained a decree in a summary suit for payment of one lac of rupees odd, being in respect of the amount paid by him under the guarantee. I have already stated that defendant 6 was joined as a defendant in this suit in October 1930, and on 7th January 1931, he put in a counter-claim in this suit. In that counter-claim he mentions the decree obtained in the summary suit on 12th September 1930, and he craves leave to rely on the proceedings in the said suit and on the decree when produced; and his counter-claim then asks that his security against the press may be enforced.

Now the first point taken against defendant 6 by the appellant is that,

having regard to the fact that he obtained a personal judgment for the amount of his debt, he cannot sue to enforce his security, having regard to O. 2, R. 2, Civil P. C. So far as material that order provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and then in sub-R. (3) it is provided that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted; and then the explanation provides that for the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute one cause of action. Having regard to that explanation it is, I think, clear that, (if the rule applies at all), defendant 6, having obtained a personal judgment for his debt, cannot, without the leave of the Court, sue to enforce his mortgage security. The first point taken by Mr. Coltman on behalf of defendant 6 is that we ought to assume that the leave of the Court was obtained under O. 2, R. 2, sub-R. (3). But, in my opinion, we cannot make any such assumption. The defendant has himself pleaded the personal judgment, and not only that, but when he went into the witness-box he gave evidence that he had obtained a personal judgment. He craves leave to rely on the proceedings in the summary suit, which entitles this Court to look at the plaint in the summary suit, and the plaint contains no record of leave having been given. It is not disputed that the normal practice is to endorse such leave on the plaint. It seems to me that defendant 6 having pleaded that he has obtained a personal judgment, it is then a condition precedent to his enforcing his mortgage (if O. 2, R. 2, applies) that he should show that leave has been obtained, and as he has not shown it, we must assume that it was not obtained.

The next point taken by Mr. Coltman is that O. 2, R. 2, does not apply because he is entitled under O. 34, R. 14 (1), to claim a sale of the mortgaged property, notwithstanding the personal judgment. That rule provides:

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in O. 2, R. 2."

If that rule applies it takes this case out of O. 2, R. 2, and justifies defendant 6's counter-claim. But the answer made by Mr. Engineer on behalf of the appellants is that O. 34 is confined to mortgages on immovable property, a point upon which, curiously enough, there appears to be no authority. If one reads R. 14, O. 34, alone in the absence of any context, there would certainly seem to be no reason for confining it to mortgages of immovable property. The words used are "mortgagee," "mortgage" and "mortgaged property" all of which were applicable, as much to moveable as to immovable property. Nor do I myself see any sufficient reason in the nature of things why the prohibition contained in R. 14 against bringing the mortgaged property to sale otherwise than in a suit for sale in enforcement of the mortgage should not apply as much to a mortgagee of moveable property as to a mortgagee of immovable property. But in construing this rule we must have regard to the context in which it appears, and I think also to its historical origin. O. 34 was incorporated in the Civil P. C. in 1908, and the provisions of the order were taken from the Transfer of Property Act. R. 14 was S. 99, T. P. Act, and that section appears in Ch. 4, of the Act which is headed "Of Mortgages of Immovable Property and Charges". "Charge" is defined in S. 100 of the Act and applies only to charges of immovable property. So that O. 34, was substituted for sections in the Transfer of Property Act which dealt only with mortgages of immovable property, and I think a presumption arises that in taking these provisions out of an Act relating to property and incorporating them in an Act relating to procedure the legislature did not intend to extend the scope of the provisions, although, no doubt, that presumption would be rebutted if the legislature had used language to show that it did intend to extend the scope of the provisions. Now not only is there no reference in O. 34 to moveable property, but the order is headed

"Suits relating to mortgages of immovable property."

Then the substantive provisions of the order use such words as "mortgagee," "mortgage security" and "mortgage property" without any distinction being drawn between mortgages of moveable and immovable property, and it seems to me that in those circumstances we must read the heading as in effect defining those general words and limiting their operation to mortgages on immovable property. We were referred to a certain number of cases as to the effect of headings in an Act of Parliament, and Mr. Coltman contends, relying particularly on the case of *Fletcher* v. *Birkenhead Corporation* (1), that the Court can only look at a heading in order to assist in the construction of some word or phrase which is doubtful or ambiguous, and he says that the words of O. 34, "mortgage" "mortgage security" and so forth are not ambiguous, but it seems to me that that is putting the case on too narrow a ground and that we are entitled to look at the heading in order to confine the generality of the language used in the body of the order. Reading O. 34 in the light of the heading, and having regard to the history of the order, we must in my judgment, construe it as confined entirely to mortgages of immovable property. That being so, I think that the counterclaim of defendant 6 necessarily fails.

But then Mr. Coltman says that even if that be so, O. 2, R. 2, does not destroy the rights of defendant 6 under his mortgage; all that it does is to prevent him suing to enforce those rights, and in so far as he may have rights which he can obtain without suing to enforce them O. 2, R. 2, is no bar. I agree with that contention. I think that the mortgage of defendant 6 is still alive and that defendant 6 is entitled to all rights thereunder which he can obtain without suing to enforce them. So that the question really comes to this; what rights has defendant 6 as a defendant in the plaintiffs' suit, treating his counterclaim as gone? Now, the plaintiffs are suing to enforce what is in substance a first mortgage, and they are bound therefore to make defendant 6 a defendant as a person claiming to be entitled to a subsequent mortgage. Defendant 6 is in my opinion entitled in the plaintiffs' suit to prove his mortgage, and, having proved his mortgage, I think that the Court is bound to decree to defendant 6 the first right to redeem the plaintiffs' mortgage. I think further that if the property is sold in the plaintiffs' suit, and the proceeds are brought into Court, and those proceeds are more than sufficient to pay the plaintiffs what is due to them, then the balance will have to be paid to defendant 6 as the person having a first charge on the equity of redemption, to the extent, of course, of his charge, and I think the order must so provide. The English cases cited by Mr. Coltman, and particularly the case of *Lloyd In re, Lloyd* v. *Lloyd* (2), support that view. But has he any further right? Mr. Coltman says that if O. 34, does not apply, then there are no rules as to the methods of enforcing a mortgage on personal property or as to the parties who should be brought before the Court, and that being so, he says we should follow the English practice in similar cases. Undoubtedly the English practice, where there are several mortgages, is to work out the rights of the parties by one order, that is to say, by giving successive rights of redemption and making successive orders for foreclosure. The general practice is stated in Vol. 3, Seton's Judgments and Orders (Edn. 7), at p. 1909 in these terms :

> " Where there are more incumbrancers than one, the mesne incumbrancers must successively redeem all prior to them, or be foreclosed ; and must be redeemed by, or will be entitled to foreclose, all subsequent to them : and a first mortgagee seeking to foreclose must therefore necessarily make all persons interested in the equity of redemption parties to the action."

That undoubtedly is the practice of the English Courts, but the question which we have to determine is whether a puisne mortgagee whose right to enforce his mortgage is gone is entitled as of right merely in his capacity as a defendant in the first mortgagee's action to claim to foreclose the mortgagor. I am not aware myself of any authority on the point, and the industry of counsel has failed to produce one. I should have thought that the point must have arisen

1. (1907) 1 K B 205=76 L J K B 218=96 L T 287=71 J P 111=5 L G R 293=23 T L R 195.

2. (1903) 1 Ch. 385=72 L J Ch 78=87 L T 541 =51 W R 177=19 T L R 101.

in the somewhat analogous case of a second mortgage which is time-barred. I do not know of any case in which an order has been made giving a defendant, second mortgagee, whose mortgage has become unenforceable, a right to foreclose subsequent mortgagees or the mortgagor, and in the absence of authority it seems to me that it is not a right which the defendant can claim in his capacity as a defendant. As long as defendant 6 confines himself to his rights as a defendant he is on safe ground, but directly he puts himself into what is substantially the position of a plaintiff, then he must fail having regard to O. 2, R. 2. It seems to me that as soon as a puisne mortgagee claims to foreclose he is really suing to enforce his mortgage, and that we ought not to allow him to take advantage of his position as defendant in the prior mortgagee's suit to obtain something which the legislature has denied him the right to claim as a plaintiff. That being so I think that we must modify the decree made by the learned Judge by confining the rights of defendant 6 to a right to redeem the plaintiffs' mortgage and a right to receive any balance of the proceeds of sale derived from the sale of the property if the plaintiffs' mortgage is not redeemed. Mr. Engineer was prepared to go further than that and take an order in the terms of Form 9 in Appx. D, Civil P. C., but I think that form goes too far in a case such as this.

In particular I think that a defendant whose right to enforce his mortgage is barred under O. 2, R. 2, is not entitled to insist on provision 5 (a) in that form, namely, that if the defendant-mortgagee pays into Court to the credit of this suit the amount adjudged due to the plaintiff but defendant 1 (the mortgagor) makes default in the payment of the said amount, defendant-mortgagee shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree. In view of O. 2, R. 2, we cannot say that defendant 6 is entitled to apply for a final decree. As regards costs, defendant 6 shall pay half of the costs of the appellant and there will be no order as regards the costs of the other half.

Blackwell, J.—It has been contended by the appellant, the Official Assignee of the estate and effects of defendants 2 and 3, that the learned trial Judge was wrong in allowing the plaintiffs to get credit for certain interim payments that were made by the receiver in another suit out of the unsecured assets of the insolvents. But by an order dated 11th November 1930, which was made in the other suit namely, Suit 1808 of 1930, an order which was opposed by the Official Assignee, the appellant in the present suit, it was ordered that the receiver out of the funds in his hands should pay Rs. 1,500 to the plaintiffs per month under a consent order dated 7th October 1930, which had been passed in the present suit. It is to be observed that the appellant was not a party to that order, and in my judgment it was an order which ought not to have been made. It was an order directing a receiver in another suit to make the payments therein provided. Not only were the parties in the other suit not before the Court but all the parties to the present suit were not before the Court either, and that order was made merely upon the affidavit of one of the partners of the plaintiff firm, it not being opposed by one Murlidhar Shrinivas who without being a party to the present suit had previously made an application in it. That is unfortunately the kind of order which is constantly made on the original side. Those orders come to be made because there is no summons taken out before the order is made.

What happens is that attorneys go into the chambers of the learned Chamber Judge, present an order which they say is consented to, and the learned Judge makes the order. He is not in a position to know whether the parties who ought to have been served have been served or whether it is otherwise a proper order. I hope that this practice will cease. However the payment which was ordered to be made under that order of 7th October 1930, was later ordered to be made under the order dated 11th November 1930, to which I have already referred, in a suit to which the appellant was a party. It has been contended by Mr. Engineer for the appellant that that order of 11th November was expressed to be made without prejudice to the rights and contentions of the parties, and he contends that those words give to the appellant the right to challenge the payments made by the receiver.

There are however no words in the order itself which expressly reserves such a right. The order for those payments as it seems to me would have been useless if they could have been challenged later, and but for an order directing such payments to be made, the plaintiffs might have insisted upon their right to a receiver and have paralysed the working of the press. In my opinion the words "without prejudice to the rights and contentions of the parties," whatever they may mean, cannot mean that the appellant was to be at liberty to challenge the payments made under those orders at a later date. The appellant did not appeal against the order of 11th November 1930, and, in my opinion, he is bound by it.

It is next to be observed that the appellant consented to an order dated 12th February 1931, under which the payments by the receiver were continued upon the terms of the order of 11th November 1930, with certain immaterial variations. In my opinion the appellant is precluded by those orders from challenging now the payments which were ordered to be made and were made by the receiver in the other suit. In any event I fail to see how the appellant can seek in this suit to compel the plaintiffs to abandon the amounts paid to them by a receiver under orders of the Court for which they have given credit and to ask in this suit for a decree for a larger amount than Rs. 11,497 odd which they say is due to them. Accordingly, in my opinion, this contention of the appellant fails. On the other hand, in my view, the appellant does rightly complain of that part of the decree which orders the receiver in the other suit to make payments in the future out of assets not covered by the security on which the plaintiffs sue. That part of the order is, in my opinion, wholly bad not only because it directs payments out of assets not covered by the plaintiffs' security, but also because it directs a receiver in another suit, all the parties to which are not before the Court in this suit, to make the payments therein set out. To that extent therefore it seems to me that the present decree must be varied.

As regards defendant 6, this case has been argued upon the footing that when defendant 6 brought a summary suit for the amount due to him by the mortgagors he did not obtain the leave of the Court to omit to sue in that suit on the mortgage as required by O. 2, R. 2, sub-R. (3), Civil P. C., if he wished to reserve his rights to enforce his mortgage in a Court of law. Mr. Coltman has argued that this is immaterial having regard to O. 34, R. 14, Civil P. C., which entitles a mortgagee to institute a mortgage suit notwithstanding anything contained in O. 2, R. 2. Mr. Coltman contends that O. 34 extends to mortgages of moveable property. He submits that the word "property" throughout the Code means any kind of property and that that is its plain meaning in R. 14 and in the other rules of O. 34 where the word "property" occurs. Accordingly, Mr. Coltman contends that you are not entitled to read the heading of O. 34 which is "Suits relating to Mortgages of Immovable Property" into each of the rules of that Order, because, as he contends, the words "mortgaged property" appearing therein plainly and unambiguously mean any kind of mortgaged property. In this connexion he relies on the class of cases of which *Union Steamship Company of New Zealand* v. *Melbourne Harbour Trust Commissioners* (3) and *Fletcher* v. *Birkenhead Corporation* (1) are instances. On the other hand, Mr. Engineer relies on another line of cases of which *Eastern Counties, etc., Companies* v. *Marriage* (4) is an instance. In my opinion, in order to determine this question we must have some regard to the history of this matter and to circumstances under which the provisions of O. 34 came to be inserted in the Civil Procedure Code. The learned Chief Justice in his judgment has set out the history and I need not again refer to it. In Maxwell on the Interpretation of Statutes, 7th Edn., at p. 44, the question what effect is to be given to headings a statute is dealt with as follows:

> "The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections,"

and a number of authorities are cited in support of that proposition. Then at p. 37 it is stated:

> "The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it; and, as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be

3. (1884) 9 A C 365=53 L J P C 59=50 L T 337=5 Asp. M C 222.
4. (1860) 9 H L C 32=31 L J Ex 73=7 Jur n s 53=3 L T 60=8 W R 748.

consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt."

Then at p. 39 it is said:

"But the preamble cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt."

I think the observations made in Maxwell on the Interpretation of Statutes, to which I have referred, summarise the law on the matter accurately. Applying then to the present case it seems to me that you are entitled to read the heading of O. 34 into the various rules of that Order having regard to the history of the Order for the purpose of fixing the meaning of words which may have more than one meaning and for the purpose of keeping the effect of the Act within its real scope. That being my view of the matter, it seems to me that defendant 6 in this case is not entitled to rely upon his counter-claim, which is in the nature of a cross-suit, and that O. 2, R. 2, is a bar to that counter-claim. The question then next arises as to what are the rights of defendant 6 apart from his counter-claim. Mr. Coltman submits that if O. 34 does not apply to mortgages of moveable property, the English practice of ascertaining the rights of the parties by one order where there are several mortgages should be applied. I agree with Mr. Coltman that the effect of the explanation to O. 2, R. 2, Civil P. C., is not to extinguish the charge of defendant 6. I think that it merely prevents him from exercising in a Court of law any right to relief under that charge. Mr. Coltman says that O. 2, R. 2, is inapplicable to the position of defendant 6 in the present suit because he has not himself brought a suit but is before the Court as a defendant. It seems to me however that, when it was brought to the notice of the Court in evidence, as it was in the present case, that defendant 6 brought a summary suit and recovered a decree, it was then the duty of the Court to ascertain whether defendant 6 had reserved his rights to ask a Court of law subsequently to enforce his mortgage. It is plain that he did not ask the Court to reserve him any such right. That being so, in my opinion, having regard to the explanation to O. 2, R. 2, and the provisions of that Order the Court ought not to allow defendant 6 to obtain as a defendant any relief which he would not have been entitled to obtain as a plaintiff. Accordingly, I think that the rights of defendant 6 must be restricted to a right to redeem the plaintiffs' mortgage and a right to receive the balance of the proceeds of sale resulting from the sale of the property, should the plaintiffs' mortgage not be redeemed. I agree that the decree must be modified in the manner indicated by the learned Chief Justice.

M.N. *Decree varied.*

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Special Bench

BEAUMONT, C. J., BROOMFIELD AND NANAVATI, JJ.

Ramachandra Ganesh Khadkikar — Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 153 of 1932, Decided on 21st July 1932, against decision of First Class Magistrate, Sholapur.

Emergency Powers Ordinance (2 of 1932), S. 21 — Magistrate empowered under Ordinance—Offence under Ordinance— Trial by Magistrate as First Class Magistrate — Sentence is limited by Criminal P. C. (1898), S. 32.

The accused was tried by a First Class Magistrate who was also invested with the powers of a special Magistrate under the Ordinance for an offence of disobeying the notice under S. 4 of the Ordinance. The trial was by the Magistrate as First Class Magistrate and accused was sentenced to two years' rigorous imprisonment and Rs. 1,500 fine.

Held: that the fine of Rs. 1,500 was in excess of the sum he was entitled to impose. [P 59 C 1]

G. N. Thakor and *G. B. Chitale* — for Accused.

V. F. Taraporewala and *P. B. Shingne* —for the Crown.

Facts.—Ramchandra Ganesh Khadkikar a pleader practising in the Courts of Sholapur, was arrested at Sholapur on 6th January 1932, under S. 3, Emergency Powers Ordinance, 1932. On his release on 18th January 1932, he was served with a notice, under S. 4 of the Ordinance, requiring him to report himself to the Sholapur police every day at 6 a. m., 12 noon and 8 p. m. He obeyed the order till 25th January 1932 but failed to do so on that day at 12 noon. Mr. Khadkikar was tried by S. B. Kale, Magistrate, First Class, Sholapur City for this disobedience, and convicted and sentenced

to suffer rigorous imprisonment for two years. He was also ordered to pay a fine of Rs. 1,500 ; in default to suffer further rigorous imprisonment for six months. The trying Magistrate was invested with the powers of a Special Magistrate under the Ordinance. The proceedings were however headed as: "In the Court of the Magistrate, F. C., Sholapur," and the order was signed "S. B. Kale, Magistrate, F. C." The Sessions Judge having declined to interfere with the conviction and sentence, Mr. Khadkikar came in revision to the High Court.

Beaumont, C. J.—The trial being by a First Class Magistrate, and not by a Special Magistrate, the fine of Rs. 1,500 is in excess of the sum which he was entitled to impose. We must reduce the fine to the limit of Rs. 1,000. The sentence in default will remain.

R.K. *Order accordingly.*

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* A. I. R. 1933 Bombay 59

PATKAR AND BARLEE, JJ.

B. G. Horniman, In re.

Criminal Appln. for Revn. No. 235 of 1932, Decided on 19th September 1932, against order of Presidency Magistrate, Third Court, Bombay.

(a) Railways Act (9 of 1890), S. 113 (4) — Intention to defraud is not necessary—Proceeding is not prosecution for offence.

The proceeding under S. 113, Railways Act, is not a prosecution for an offence. The intention to defraud is not necessary, as in the cases falling under S. 112, to enable the railway administration to proceed under S. 113. The section provides a summary remedy to recover the charge incurred by a passenger together with a penalty provided in the section. [P 59 C 2; P 60 C 1]

(b) Railways Act (9 of 1890), S. 113 — Under S. 113 Magistrate functions judicially —Hence his order can be revised by High Court under Criminal P. C. (1898), S. 435.

A Magistrate acting under S. 113 exercises a judicial function and not merely a ministerial or an executive function and as such the Magistrate is an inferior criminal Court within the meaning of S. 435, Criminal P. C.; hence the High Court can revise an order passed by such a Magistrate: 13 *P R* 1891 (*Cr*), *Foll.*; 9 *Bom L R* 1347; *A I R* 1930 *Sind* 162, *Dist.* [P 61 C 1]

*** (c) Railways Act (9 of 1890), Ss. 67, 68 and 113 (2)—Person holding ticket of lower class but travelling in higher class without necessary permission — He is liable to pay excess fare and penalty.**

There is no provision in the Railways Act which entitles a person, who has purchased a ticket of a lower class, to enter a compartment of a higher class without a proper ticket for that class. But if he intends to travel in a carriage of a higher class he must do so with the permission of the railway servant. And if he does so on the ground of want of accommodation in the class for which he holds the ticket but without first obtaining the requisite permission he is liable to pay excess fare and penalty under S. 113 (2). [P 62 C 1,2]

P. B. Shingne—for the Crown.

B. K. Desai and *W. J. Nimkar* — for the Railway Company.

Patkar, J.—This is an application by the petitioner for revision of the order passed by the Presidency Magistrate, Third Court, under Ss. 113 (2), (3) and (4), Railways Act 9 of 1890, directing him to pay Rs. 48-11-0 to the G. I. P. Railway, and further directing that the amount, if not paid, should be recovered as a fine. A preliminary objection is raised on behalf of the railway company that the application for revision does not lie, and reliance is placed on the decisions in the cases of *In re Dalsukhram* (1) and *Secy. of State* v. *Gobindram Jaichandrai* (2). The proceeding under S. 113, Railways Act, is not a prosecution for an offence. S. 68, Railways Act, prohibits travelling without a pass or a ticket, and S. 69 provides that every passenger shall, on the requisition of a railway servant appointed by the railway administration in this behalf, present his pass or ticket to the railway servant for examination. S. 113 provides for the consequences of the breach of this statutory obligation. Ch. 9 of the Act, which contains S. 113, deals with penalties and offences. Ss. 87 to 98 deal with penalties, Ss. 99 to 105 deal with offences by railway servants, and Ss. 106 to 130 are included under the heading of "other offences" and Ss. 131 to 134 are included under the heading of "procedure." Though S. 113 is included under the heading "other offences," sub-S. (4), S. 113, provides:

> "If a passenger liable to pay the excess charge and fare mentioned in sub-S. (1), or the excess charge and any difference of fare mentioned in sub-S. (2), fails or refuses to pay the same on demand being made therefor under one or other of those subsections, as the case may be, the sum payable by him shall, on application made to any Magistrate by any railway servant appointed by the railway administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate and shall, as it is recovered, be paid to the railway administration."

The intention to defraud is not necessary as in the cases falling under S. 112

1. (1907) 9 Bom L R 1347=6 Cr L J 425.
2. A I R 1930 Sind 162=1930 Cr C 646=126 I C 58=31 Cr L J 952=24 S L R 389.

to enable the railway administration to proceed under this section. The section provides a summary remedy to recover the charge incurred by a passenger together with a penalty provided in the section. According to the decision in *Bhimji N. Dalal* v. *B. B. & C. I. Ry. Co.* (3), the liability to pay does not arise from the contract but from the statute, and the statute prescribes the method by which the amount a passenger is liable to pay can be recovered, and the amount is to be recovered by the Magistrate as if it were a fine imposed on the passenger, and paid to the railway administration. In *Queen-Empress* v. *Kutrapa* (4) it was held that imprisonment in default of payment cannot be inflicted under S. 113, Railways Act. The amount can only be recovered by attachment and sale of moveable property. The proceeding under S. 113 is not a prosecution for an offence. Though S. 113 is included among Ss. 106 to 130, which are placed under the heading of "other offences," the classification appears to be misconceived, for some of these sections do not relate to offences, and S. 132 indicates that the acts committed under S. 113 are not deemed to be offences. S. 131 makes no reference to S. 113 and S. 132 refers to any offence other than that mentioned in S. 131 and specifically refers to failure or refusal to pay excess charge demanded under S. 113. It is clear therefore that the act referred to in S. 113, Railways Act, is not an offence.

Further, S. 133 provides that offences under the Act shall be tried by a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the Second Class, but proceedings under S. 113 may be taken before any Magistrate, including a Magistrate of the Third Class. It is contended on behalf of the opponent that the Magistrate mentioned in S. 113 is a persona designata and that the proceeding relates to recovery of money and is a civil proceeding, and the action of the Magistrate under S. 113 is in his executive capacity. In *In re Dalsukhram* (1) it was held that a Magistrate hearing an appeal under S. 86, Bombay District Municipal Act, 1901, was not an inferior criminal Court within the meaning of S. 435, Criminal P. C., on the ground that he had jurisdiction given by the Act to deal with the question of a civil liability. S. 86 invests a Magistrate with appellate powers against a notice of demand issued under sub-S. (3), S. 82, Bombay District Municipal Act, 3 of 1901, and the Magistrate in that case exercises an appellate authority against the executive order of the notice of demand under sub-S. (3), S. 82, Bombay Act 3 of 1901. Under S. 113, Railways Act, it is not merely the sum which is due to the railway company in the form of fare that is recovered but also the penalty provided by the section. In *Secy. of State* v. *Gobindram Jaichandrai* (2) reference is made to several cases but no adequate reasons have been given to support the conclusion arrived at in that case.

It appears however that the High Courts have interfered under the revisional powers with orders under S. 113, Railways Act, when imprisonment in default of payment of fine was inflicted under S. 113, Railways Act: see *Queen-Empress* v. *Kutrapa* (4), *Queen-Empress* v. *James Crowson* (5), *Queen-Empress* v. *Subramania Ayyar* (6), *Queen-Empress* v. *Ram Pal* (7), *Station Master, Ranaghat* v. *Habul Sheikh* (8) and *Emperor* v. *Ma Kalay Ma* (9).

It is true that the point now taken was neither raised nor considered in those cases. The question therefore arises, whether the Magistrate acting under S. 113 exercises a judicial function or an executive function, and whether the Magistrate is an inferior criminal Court within the meaning of S. 435, Criminal P. C. In *A. Grey* v. *North-Western Railway Administration* (10) it was held, following the decision in *Queen-Empress* v. *Manaji* (11), that the proceedings of the Magistrate under S. 113 are judicial proceedings and fall within the ambit of Ss. 435 and 439, Criminal P. C. Under S. 4 (m), Criminal P. C., "judicial proceeding" includes any proceeding in the course of which evidence is or may be

3. A I R 1926 Bom 266=94 I C 742=50 Bom 215.
4. (1893) 18 Bom 440.
5. (1899) 1 Bom L R 166.
6. (1897) 20 Mad 385=1 Weir 871.
7. (1897) 20 All 95=(1897) A W N 196.
8. A I R 1920 Cal 261=55 I C 593=21 Cr L J 321.
9. A I R 1929 Rang 11=113 I C 73=30 Cr L J. 57=6 Rang 619.
10. (1891) 13 P R 1891 Cr.
11. (1890) 14 Bom 381.

legally taken on oath. Proceedings, though of a civil nature, e. g., proceedings of the Magistrate under S. 2, Workmen's Breach of Contract Act, or S. 488, Criminal P. C., if they are held by a criminal Court, are subject to revision under S. 435, Criminal P. C. I may refer in this connection to the case of *Emperor* v. *Devappa Ramappa* (12), where the test laid down is not the nature of the proceeding held by the Court but the nature of the Court in which that proceeding is held. In *Dinbhai Jijibhai, In re* (13), it was held that the order passed by the Magistrate under S. 161 (2), Bombay District Municipal Act, 1901, can be revised by the High Court, and it was held that as the Magistrate has to make some inquiry in a proper case there is no reason to treat such an inquiry as purely ministerial.

In fact the proceedings in the present case were conducted in the same manner as a judicial proceeding. Evidence has been taken; the statement of the applicant is recorded, and the evidence is weighed by the learned Magistrate. It is difficult to hold that such a proceeding is merely a ministerial or executive proceeding, and not a judicial proceeding. Under S. 113 (4) the Magistrate has to decide whether the sum is payable by the passenger, and for that purpose he has to take evidence in the case on any of the points on which the passenger contends that the sum is not payable, and the Magistrate has to recover the sum payable including the penalty as if it were a fine imposed on the passenger by the Magistrate. S. 435 empowers the High Court or any Sessions Judge or District Magistrate or any Sub-Divisional Magistrate specially empowered to call for and examine the record of any proceeding before any inferior criminal Court in order to satisfy itself as to the correctness, legality or propriety of any finding or order. "Proceeding" is a very wide term, and would include any judicial proceeding taken before any inferior criminal Court even though it may not relate to any specific offence. I think therefore that the High Court has the power to revise any order passed by a Magistrate under S. 113 (4),

12. A I R 1919 Bom 158=50 I C 492=20 Cr L J 316=43 Bom 607.
13. A I R 1919 Bom 93=52 I C 670=20 Cr L J 702=43 Bom 864.

and the preliminary objection therefore fails.

On the merits is is contended on behalf of the applicant, first, that under S. 145 (1) there must be an authorization in writing to act for or represent the railway company before any criminal Court and that no such authority in writing has been produced by Mr. Londe to enable him to file the complaint in the present case. The point does not seem to have been taken specifically before the Magistrate. Under S. 113 (4) the application is to be made to the Magistrate "by any railway servant appointed by the railway administration in this behalf." It is contended on behalf of the railway company that S. 145 refers to a person who is appointed to conduct the proceedings in a criminal Court, and that in the present case Mr. Behere was appointed to conduct the proceedings by an instrument in writing. Mr. Londe in his cross-examination has stated that the Chief Traffic Manager has issued orders for filing this complaint, and it is contended on behalf of the opponent that if this point had been taken in the lower Court, they could have produced the order in writing appointing Mr. Londe to make an application under S. 113 (4). I think that the point does not, in my opinion, vitiate the proceedings as at the most it is merely an irregularity which does not prejudice the petitioner, and the point ought to have been taken specifically before the lower Court. It is next urged on behalf of the applicant that the sum of Rs. 48-11-0 was wrongly levied from the applicant and the penalty of Rs. 6 was not due, but only a penalty of Re. 1 under sub-S. (3), Cl. (a). There is no evidence in the case that the applicant immediately after incurring the charge and before being detected by the railway servant notified to the railway servant on duty with the train the fact of the charge having been incurred. This point also does not appear to have been taken before the Magistrate, and it is therefore not necessary to go into the question whether Mr. Williams was a railway servant on duty with the train.

The next point is the most important point in the case, and it is urged on behalf of the applicant that he was justified in not travelling in the second class compartment for which he had purchased the ticket and in which there were par-

danshin ladies, and it is contended on his behalf that so long as there was room available in the train, the railway company was bound under the contract to provide him reasonable accommodation. It is difficult to hold on the evidence that the applicant was not justified in refusing to travel in the second class compartment in which there were pardanshin ladies.

The question however arises whether he was justified in travelling in a first class compartment without the permission of a railway servant when he had not purchased a proper ticket for the first class but had purchased only a second class ticket. Under S. 67, Railways Act, fares shall be deemed to be accepted, and tickets to be issued, subject to the condition of there being sufficient room available in the train for which the tickets are issued. But S. 68 provides that no person shall without the permission of a railway servant, enter any carriage on a railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket. It is contended on behalf of the applicant that if there was room available in the train, in a class higher than that for which the passenger had purchased a ticket, the railway company was bound under the contract to provide reasonable accommodation for him, and that in the absence of reasonable accommodation, he was entitled to enter even a higher class and the ticket which he has purchased for the lower class would be a proper ticket. It is difficult to accept this argument. There is no provision in the Railways Act, which entitles a person, who has purchased a ticket of a lower class, to enter a compartment of a higher class without a proper ticket for that class. We are not concerned here with the question whether the railway authorities should not have acted more discreetly in the matter having regard to the circumstances of the case and allowed the applicant to travel in the first class when there was no proper or reasonable accommodation in the second class for which he had purchased a ticket and in which under the circumstances mentioned by him he was prevented from travelling.

Section 68, Railways Act, prohibits a person entering any carriage without the permission of a railway servant unless he has a proper pass or ticket. It appears from the provisions of the Railways Act, that if he is unable to travel in the class for which he has purchased a ticket, he can apply for his fare being refunded under S. 67, sub-S. (2), on his returning the ticket within three hours after the departure of the train, or under sub-S. (3) S. 67, if there is no room available in the class of the carriage for which he has purchased a ticket, and he is obliged to travel in a carriage of a lower class he shall be entitled on delivering up his ticket to a refund of the difference between the fare paid by him and the fare payable for the class of carriage in which he has travelled. He can therefore either have his fare refunded or have the difference refunded to him if he travels in a carriage of a lower class. But if he intends to travel in a carriage of a higher class it is clear that there is no section in the Railways Act which empowers him to do so. Under S. 68 he could have travelled in a higher class with the permission of the railway servant. But in the present case it is not proved that the applicant secured the permission of a railway servant before entering a carriage of a higher class. The consequences of travelling by a higher class without the permission of a railway servant under S. 68, Railways Act, are provided for by sub-S. (2), S. 113 which lays down that if a passenger travels or attempts to travel in or on a carriage, or by a train, of a higher class than that for which he has obtained a pass or purchased a ticket he shall be liable to pay, on demand by any railway servant appointed by the railway administration in this behalf the excess charge in addition to any difference between any fare paid by him and the fare payable in respect of such journey as he has made. S. 113, Cl. (2) is clear and explict, and admits of no implications or exceptions.

Section 113 applies not to offenders against justice but ordinarily to innocent persons, who, as stated in the judgment of the Calcutta High Court in *Hart* v. *Buskin* (14), "may find themselves in the wrong by mere accident." I think therefore that the excess fare together with the penalty was properly ordered to be recovered by the learned Magistrate. The result therefore is that this application fails and the rule will have to be discharged.

14. (1885) 12 Cal 192.

Barlee, J.—I agree. Even assuming that in the circumstances there was no sleeping berth available in the second class, Mr. Horniman must fail. I cannot find anything to justify his view that he was entitled to travel by first class on his second class ticket. The relations between him and the railway company were governed not only by contract but by statute, and the Act is quite clear. S. 113 (2), Railways Act, runs:

"If a passenger travels or attempts to travel in or on a carriage, or by a train, of a higher class than that for which he has obtained a pass or purchased a ticket . . . he shall be liable to pay, on demand . . . the excess charge, etc."

To this rule there is no exception in the Act. The learned counsel has referred us to Ss. 67 and 68, but in my opinion they do not help him. S. 67 provides that a person for whom there is no room in the train for which he has purchased a ticket or who is obliged to travel in a carriage of a lower class, shall be entitled to a refund of the fare paid or to a refund of the difference between the fare paid by him and the fare payable for the lower class. There is nothing in the Act to show that he can, in any circumstances, travel by first class on a second class ticket.

V.S. *Rule discharged.*

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PATKAR AND BARLEE, JJ.

Emperor

v.

Alli Hassan Limbuvala—Accused.

Criminal Appeal No. 352 of 1932, Decided on 28th September 1932, against order of Honorary Presidency Magistrate, Fort, Bombay.

(a) Police Act (3 of 1888), S. 2 (5)—Victoria Terminus is included in Bombay city—Bombay Public Conveyances Act (1920), S. 26.

The precincts of the G. I. P. Railway (Victoria Terminus Station) would not by reason of being included in the police district cease to be part of the city of Bombay of which it forms part. The offence committed within the precincts of the station is committed within the limits of the city of Bombay and therefore the Bombay Public Conveyances Act applies. [P 64 C 1, 2]

(b) Police Act (3 of 1888), S. 2 (3) and (4)—Railway Police can set law in motion for offences under Bombay Public Conveyances Act (1920), S. 26.

The railway police have all the powers of the general police within their special district, the railway station. The police officer of the railway district has power to set the law in motion for offences under Bombay Public Conveyances Act S. 26: *A I R* 1932 *Bom* 256, *Foll.* [P 64 C 2]

P. B. Shingne—for the Crown.

Y. W. Desai—for Accused.

Patkar, J.—In this case the accused was charged under S. 26, Bombay Public Conveyances Act (Bom. Act 7 of 1920) and S. 123, Railways Act 9 of 1890. The learned Honorary Presidency Magistrate acquitted the accused presumably on the ground that the place, where the accused was found, being included within the limits of the railway district, was not included within the limits of the city of Bombay for the purpose of the Bombay Public Conveyances Act, and that the railway police had no power to arrest the accused for an offence under an enactment which was confined only to the city of Bombay. Under S. 30, Bombay Public Conveyances Act 7 of 1920, any police-officer may arrest without warrant any person who has committed any offence under this Act, and may seize and detain any conveyance or horse in relation to which such offence has been committed. Similarly, S. 123, Railways Act, refers to the disobedience of the reasonable directions of any police-officer. The question is whether the place where the accused committed the offence is included within the city of Bombay for the purpose of the Bombay Public Conveyances Act. Under S. 20, Act 5 of 1861, police-officers enrolled under the Act shall not exercise any authority, except the authority provided for a police-officer under the Act and any Act which shall thereafter be passed for regulating criminal procedure. Under S. 23 it shall be the duty of every police-officer to detect and bring offenders to justice. Under S. 24 it shall be lawful for any police-officer to lay any information before a Magistrate, and to apply for a summons, warrant, search warrant or such other legal process as may by law issue against any person committing an offence.

Section 2, Act 3 of 1888, which is an Act to amend the law relating to the regulation of police, lays down that notwithstanding anything in Act 24 of 1859, Act 5 of 1861 or any Act relating to the police in any presidency town, the Governor-General in Council may, by notification in the Gazette of India, create a general police district embracing parts of two or more presidencies, provinces, or places, and direct the enrolment under Act 5 of 1861 of a police force for service

therein. Sub-S. (3) lays down that members of a police force enrolled for service in a general police district created under sub-S. (1) shall have within every part of any presidency, province or place of which any part is included in the district the powers, duties, privileges and liabilities which, as police-officers appointed under Act 5 of 1861, they have within the district. Sub-S. (5) provides that a part of a presidency, province or place included in a general police district under sub-S. (1) shall not by reason of being included therein cease for the purposes of any enactment relating to police to be part of the presidency, province or place of which it forms part. It is therefore clear under this section that the power is vested in the Governor-General in Council to create a general police district, and the part of a presidency, province or place included in a general police district shall not by reason of being included therein cease to be part of the presidency, province or place of which it forms part. Therefore the precincts of the G. I. P. Railway would not by reason of being included in the police district cease to be part of the city of Bombay of which it forms part. Under sub-S. (4) any member of such a force in any part of the local area in which he has the powers of a police-officer under sub-S. (3) shall exercise any of the powers which an officer in charge of a police station has in that part, and, when so exercising any such power, shall, subject as aforesaid, be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station.

The railway district has been formed by Government of India Notification 943, dated 19th October 1917, published at p. 2430, Part I, of the Bombay Government Gazette, dated 25th October 1917, and the railway district so formed does not cease to be a part of the presidency, province or place of which it forms part according to sub-S. (5), S. 2, Act 3 of 1888. The definition of the city of Bombay as given by the General Clauses Act, Bombay Act 1 of 1904, is as follows:

> " 'City of Bombay' shall mean the area within the local limits for the time being of the ordinary original civil jurisdiction of the Bombay High Court of Judicature."

According to R. 386 of the Rules and Forms of the Bombay High Court, p. 88, the Sheriff shall ordinarily execute the process of High Court in the Island of Bombay, Cross alias Gibbet and Butcher's Island and the coasts and harbours thereof respectively and shall not be compellable to execute process beyond the said limits. The limits of the city of Bombay have been discussed in the case of *Trimbak Gangadhar* v. *Bhagwandas Mulchand* (1). It is not denied that the railway premises are included in the city of Bombay. The only ground on which the judgment of the learned Honorary Magistrate proceeds is that the formation of the railway district removes those premises from the city of Bombay. That view is entirely opposed to sub-S. (5), S. 2, Act 3 of 1888. We think therefore that the offence was committed within the limits of the city of Bombay and therefore the Bombay Public Conveyances Act applied.

The next question is whether the police-officer of the railway district has power to set the law in motion. According to S. 2, sub-Ss. (3) and (4), Act 3 of 1888, the police-officer has ample power to set the law in motion. According to the decision in *In re Ganesh Narayan Sathe* (2), anyone who is not even a police-officer can set the criminal law in motion. The precise point was raised in a recent case in the case of *Emperor* v. *Baloo Babaji* (3), where the question whether the Bombay Public Conveyances Act applied to the premises of the Bombay Central Station was considered. It was held by the learned Chief Justice that under Act 3 of 1888 and the Government Notification No. 943, dated 19th October 1917, the railway police had all the powers of the general police within their special district, the railway station, and that whether the railway police had the power of the ordinary police or not, the Magistrate was bound to decide the case on the evidence. Mr. Desai appearing on behalf of the accused has acceded to the correctness of the contention on behalf of the Crown, and has not attempted to support the judgment of the learned Honorary Magistrate. We think therefore that the view of the learned Honorary Magistrate is erroneous.

1. (1898) 23 Bom 348.
2. (1889) 13 Bom 600.
3. A I R 1932 Bom 256=(1932) Cr C 296=137 I C 8=33 Cr L J 462.

Mr. Desai on behalf of his client has invited us to dispose of the case here instead of sending it back to the learned Honorary Magistrate in order to avoid trouble and annoyance to his client. We think that the offence is clearly proved on the evidence of Sakharam, Police Constable No. 274, and the admission of the accused. As the appeal is filed only on a question of principle we convict the accused of the offences under S. 26, Bombay Public Conveyances Act, and S. 123, Railways Act, and fine him one rupee for each of the offences; in default one week's simple imprisonment under each of the sections. One week's time is allowed to pay the fine.

Barlee, J.—I agree and have nothing to add.

R.K. *Order accordingly.*

✲ A. I. R. 1933 Bombay 65

BEAUMONT, C. J. AND NANAVATI, J.

Maniben Liladhar Kara—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 394 of 1932, Decided on 19th August 1932, against order of Chief Presidency Magistrate, Bombay.

(a) Penal Code (1860), Ss. 124-A and 153-A Court has to look at whole speech to gather its effect.

In determining the effect of a speech the Court has to look at the speech as a whole, and not pay undue regard to any particular sentence or phrase. And looking at the speech as a whole the Court has to gather from the language used what the intention of the speaker was. It is obviously not open to a speaker to say that he did not intend his language to bear the meaning which it naturally does bear. [P 66 C 1]

✲ (b) Penal Code (1860), S. 153-A—Word "capitalist" does not denote definite class within meaning of S. 153-A.

Per *Beaumont, C. J.*—Any definite and ascertainable class of His Majesty's subjects will come within the meaning of S. 153-A although the classes may not be divided on racial or religious grounds. The word "capitalist" is altogether too vague to denote a definite and ascertainable class so as to come within S. 153-A. [P 66 C 2; P 67 C 1]

(c) Penal Code (1860), S. 124-A—To make charge of gross partiality against Government such as that Government was siding with capitalist is to inspire feeling of enmity.

Where the real gravamen of the charge which the speaker brought against Government was that Government was siding with the capitalist, that the capitalists and the Government were the two enemies of labour, that Government were getting frightened, and imposing long sentences on labour leaders and where the whole effect of the speech, so far as Government was concerned, was to suggest to the persons to whom it was addressed that Government was taking sides against them and was taking the part of their opponents.

Held: that to make a charge of gross partiality of that sort against Government was calculated to inspire feelings of enmity and disaffection towards Government. [P 67 C 1, 2]

(d) Penal Code (1860), S. 124 A — Speech advocating labour raj—No method as to its establishment proved by prosecution—No adverse inference can be drawn.

Where the only concrete suggestion which the speaker *B* made was that labour raj would be established by the methods of *A* but there was no evidence as to what the methods of *A* were:

Held: that the Court could not assume from that as against *B* that *A's* methods of establishing labour raj in India were necessarily illegal. If the methods were legal then *B* had only advocated the establishmet of labour raj by legal means. [P 67 C 2]

Held also: that it was for the prosecution to prove their case and as they had omitted to prove what the methods of *A* were, the Court could not hold that the speech advocated the establishment of labour raj by illegal means. [P 67 C 2]

✲ (e) Penal Code (1860), S 153-A—Criticism of ill-defined group cannot lead to breach of tranquillity.

The object of S. 153-A is to prevent breaches of the public tranquillity which might result from exciting feelings of enmity between different classes of His Majesty's subjects; but when the persons included in any group are not readily ascertainable any criticism of such an ill-defined group can not lead to a tumultor breach of tranquility. [P 69 C 1]

✲ (f) Penal Code (1860), S. 153-A—Connotation of the word "classes" indicated.

Per *Nanavati, J.*—The first and most important ingredient in the connotation of the term "classes" is that the words used must point to a well defined and readily ascertained group of His Majesty's subjects. Secondly, some element of permanence or stability in the group will have to be present before one can have an attempt to excite enmity against that group. Thirdly, there is the question of numbers. The group indicated must be sufficiently numerous and widespread to be designated "a class." [P 69 C 1, 2]

F. S. Talyarkhan, R. F. S. Talyarkhan, G. G. Mahadevia and *V. B. Karnik*—for Appellant.

Jamshed Kanga, G. Louis Walker and *P. B. Shingne*—for the Crown.

Beaumont, C. J.—This is an appeal by the accused against her conviction by the Chief Presidency Magistrate under Ss. 124-A and 153-A, I. P. C. The charge against the accused is that she made two speeches at a labour meeting on "May day" which constituted offences under those two sections. The accused in the written statement she put in before the learned Magistrate says that she is a social worker and has studied social science in England and elsewhere. I am bound to say that the speeches with which we have to deal do not suggest that she

has studied more than one side of the subject, but perhaps it would be unreasonable to expect a labour leader on May day to deliver anything in the nature of an impartial address. The first speech which she delivered the learned Magistrate held was unobjectionable, and as that finding has not been challenged in this Court, I need not refer to that speech. The second speech is the one which the learned Magistrate holds to come within the two sections I have mentioned.

In determining the question, we have to look at the speech as a whole, and not pay undue regard to any particular sentence or phrase. And looking at the speech as a whole we have to gather from the language used what the intention of the speaker was. It is obviously not open to a speaker to say that he did not intend his language to bear the meaning which it naturally does bear. The speech in question was not very long, and in order to determine what its real effect was, I would shortly summarise it. The speaker starts by moving a resolution which in substance expresses the solidarity of the working class, and its determination to fight and destroy the capitalist system. Then it refers to a resolve of the workers to fight the offensive of retrenchment and wage-cut launched by the capitalists by organising mass resistance in the form of general strike. In support of that resolution the speaker says that labourers must unite to fight the two enemies of Government and capitalists. A general strike, so she says, can only be declared when all labourers unite. Then she eulogises in a somewhat partial spirit the effects of a general strike. Then she says Government and capitalists have weapons; workmen have no weapons, but they have their labour which is stronger than weapons. Labourers, she says, do all the work, and are starving: is this justice? The rule of labour should be established by all labourers combining. Police and soldiers will join because they are really labourers. Everything is in the hands of labour, who want to break the powers of capitalists and imperialists. Then she says this can be done not by the methods of the terriorists of Bengal, or by the methods of Congress, but by the way of M. N. Roy. Then she says that Government are getting afraid of labour, and that labour leaders are sent to jail for long terms of imprisonment and that Congress leaders get much shorter terms, and then she ends by exhorting all labour to unite to destroy the capitalist system. So that the speech taken as a whole seems to be an exhortation to labour to unite with the object of being in a position to declare a general strike though there is no suggestion that a general strike should be declared at the present time, and the ultimate object seems to be to establish labour raj by the methods of M. N. Roy. The question is whether that speech is an offence under either of the sections, and I will deal with S. 153-A first.

The offence under that section is constituted by promoting or attempting to promote feelings of enmity or hatred between different classes of His Majesty's subjects. The first point taken by Mr. Talyarkhan on behalf of the accused is that capitalists are not a class of His Majesty's subjects. He says that S. 153-A was designed to prevent people from promoting feelings of hatred between classes of the community divided either by race or religion. He says that we should construe the section as not extending beyond that. I agree with the learned Chief Presidency Magistrate that it is not possible to limit the section in that way. I think that any definite and ascertainable class of His Majesty's subjects will come within the section, although the class may not be divided on racial or religious grounds. But I differ from the learned Chief Presidency Magistrate when he says that capitalists are a sufficiently defined class. "Capitalist" in the literal sense of the word is, I suppose, anyone who possesses any accumulated wealth, and practically every one possesses some accumulated wealth, though some people do not possess very much. On that definition practically everybody will be within the capitalist class. No doubt in the region of economic discussion capitalists are referred to in a more limited sense.

In reference to divisions between capital and labour, the capitalist generally means a person with a considerable amount of property invested in industry. But if you take any definition of that sort, it is impossible to say what amount of capital would bring a man within the class. He might be within the class one day, and without it the next. He may

be a capitalist in one country and not in another.

It seems to me that "capitalist" is altogether too vague a phrase to denote a definite and ascertainable class so as to come within S. 153-A. I may say that even if I were wrong on that construction of the Act, I should say that this speech was not sufficiently strong to promote or attempt to promote feelings of enmity or hatred against the capitalists. The capitalists are referred to in the speech as "blood-suckers," but that after all is a figure of speech. The only real charge against them is that they are exploiting labour, taking advantage of the labourer's work and paying inadequate wages. But the speaker, and I think her audience, must have appreciated that the wages of labour depend on the ordinary laws of demand and supply. People, whether they are capitalists or not, usually pay for labour the price at which they can obtain it and not more, and I do not think it can be said to be exciting feelings of enmity or hatred to suggest that capitalists are paying too little. It is quite open for a labour leader to say that out of the proceeds of industry capital is getting too big a share, just as it is open for the capitalists to say that labour is getting too big a share and that until wages come down there will he no improvement in industry. These are points of view which are perfectly legitimate; and charging your opponent with getting too big a share of the proceeds of industry is not, I think, calculated to inspire feelings of hatred or enmity towards him. I think therefore the charge under S. 153-A fails.

The case under S. 124-A is different. The offence there is bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection towards Government. Now there was, as far as I can see, no occasion for the speaker here to refer to Government at all. The resolution which she was proposing was anti-capitalist and not anti-Government, and Mr. Talyarkhan has invited us to treat her reference to Government as being a chance reference which did not affect the general tenour of the speech. But having read the speech very carefully, it seems to me impossible to adopt that view. I think the real gravamen of the charge which the speaker brings against Government is that Government is siding with the capitalists. She refers to Government and the capitalists as the two enemies; she couples them as the enemies of labour, not once but many times, and she says that Government are getting frightened, and imposing long sentences on labour leaders. I think the whole effect of the speech, so far as Government is concerned, is to suggest to the persons to whom it was addressed that Government is taking sides against them, and is taking the part of their opponents. To make a charge of gross partiality of that sort against Government is calculated, in my view, to inspire feelings of enmity and disaffection towards Government.

The learned Advocate-General says that the speech goes much further than that, and that the speaker proposes to establish labour raj or labour rule, and thereby to displace the existing Government. But the difficulty the prosecution is in there is that the only concrete suggestion which the speaker makes is that labour raj would be established by the methods of M. N. Roy, and there is no evidence as to what the methods of M. N. Roy are. It is true that the evidence shows that M. N. Roy is a communist, and that he has been recently sentenced to a long term of imprisonment for waging war against the King-Emperor, but we cannot assume from that, as against an accused person, that his methods of establishing labour raj in India are necessarily illegal. If the methods were legal, then the maker of this speech has only advocated the establishment of labour raj by legal means. The Court cannot in a criminal case draw inferences unfairly against the accused. It is for the prosecution to prove their case, and as they have omitted to prove what the methods of M. N. Roy are, we cannot hold that the speech advocated the establishment of labour raj by illegal means. I think however that there is an offence under S. 124-A; but I am willing to accept the view which Mr. Talyarkhan puts forward that the speaker was somewhat overcome by the exuberance of her own oratory, and that she did not really intend to make an attack upon Government. She has moreover through Mr. Talyarkhan expressed regret for any phrases in her speech which went beyond her real intention, which was to exhort labour to unite and join

their Unions, and she says that she does not intend to make objectionable speeches in the future. That being so, I think we may take a more lenient view of the matter than the learned Magistrate felt himself justified in taking. We propose to set aside the conviction under S. 153-A. Under S. 124-A the conviction will stand, but the sentence of imprisonment will be set aside, though the fine of Rs. 300 will stand. The fine paid in respect of the conviction under S. 153-A will be returned.

Nanavati, J.—I agree entirely as to S. 153-A. I do not think that the speech which we have read more than once in the last two days was such as was calculated to excite feelings of hatred or enmity against the capitalists towards whom it was directed. It certainly criticised them and it alleged that they appropriated to themselves an undue share and left too little to labourers. But that is merely legitimate controversy, and it is not possible to hold that putting forward or advocating a view of that character could amount to spreading feelings of enmity or hatred. Then again it is difficult to hold that capitalists or imperialists are a definite class for the purposes of S. 153-A. I cannot go quite so far as the learned counsel for the appellant wished us to go. I do not think that the term "classes" in that section must be restricted to racial or religious classes. But as was pointed out by the learned Chief Justice of Lahore in *Raj Pal* v. *Emperor* (1), a class or section as contemplated by this particular section of the Penal Code connotes a well defined group of His Majesty's subjects, and the question is whether the term "capitalists" or "imperialists" connotes a sufficiently well defined group. In these days of joint stock enterprise, capital is often divided into very small shares, and technically any one holding even a single share would be one of the proprietors of a very big concern. It is not likely that the term "capitalist" in the speech of the accused was meant to include poor people holding a very small amount of capital. Yet an attempt to restrict the term in some way presents very great difficulties.

The learned Advocate-General tried to read it as synonymous with employers. But that term is as indefinite as "capitalist". In the case of a manufacturing company like a spinning and weaving mill, you have the large body of shareholders, who are the proprietors of the concern; then you have the Board of Directors, and then you have the firm of managing agents, who actually carry on the day to day administration and engage or dismiss employees; and, lastly, there is the manager who acts under the orders of the managing agents. Which of these various groups are we to include within the term "employers?" Take the case of the dock labourers. You have the statutory body known as the Port Trust, which might be directly employing some of the dock labourers for all I know. Then there are firms of stevedores who undertake the business of loading and unloading ships. There are shipping companies who employ these stevedores to do their work for them, and there are shippers of freight who may also employ them. It would be very difficult to say which of these various bodies are to be regarded as the employers of dock labourers. Or take again the case of railway employees. The railway system is owned either by the State, or by a body of share-holders. Then there is the Agent, who has the general superintendence of the railway system. Then there is the body of higher officers who actually engage and dismiss railway employees. And one might even go further and say that the travelling public and the mercantile public who pay the revenue of a railway company are the ultimate employers of the railway staff. So that when we get down to an analysis of the idea sought to be conveyed by the terms which we are considering, it is extremely difficult to know who is included and who is to be excluded.

It may be said perhaps that the speaker meant to attack only very wealthy persons who employed their wealth in industrial undertakings and paid meagre wages to their workmen. But riches and poverty are relative terms whose limits would be fixed very differently by different persons. Also no employer of labour would admit that he pays inadequate wages. These are matters on which opinions differ widely and there is not likely to be any practical unanimity as to whom the cap fits. And the

1. A I R 1923 Lah 61=71 I C 519=24 Cr L J 167=3 Lah 405 (SB).

law could not have meant to penalise references to groups so vaguely indicated. The object of the section is to prevent breaches of the public tranquillity which might result from exciting feelings of enmity between different classes of His Majesty's subjects; but when the persons included in any group are not readily ascertainable, it is difficult to see how any criticism of such an ill-defined group can lead to a tumult or breach of tranquillity. It can hardly be said that His Majesty's subjects belong to as many different classes for the purposes of the criminal law as the resources of language can provide terms for indicating them. Thus in political controversy you may have shifting and ill-defined groups of people holding different opinions, and they may be referred to either with approbation or opprobrium. You may refer to people as diehards, or extremists, or nationalists; as free traders or fair-traders: as nationalists or communalists; as militarists or pacifists; as imperialists or little Englanders; and it would be difficult to regard the people designated or meant to be designated by these and like expressions as forming classes sufficiently precise for the purposes of the criminal law. What is a well-defined class will of course depend on circumstances. There may arise circumstances in which people designated by any of the expressions I have mentioned may be so well defined that it might be possible to say that they form a class against whom hatred or enmity could be excited. But the Courts would have to be very careful in ascertaining who were the persons attacked before holding that an attempt had been made to excite enmity against a class of people within the terms of S. 153-A, I. P. C.

As far as I can see, the first and most important ingredient in the connotation of the term is that the words used must point to a well-defined and readily ascertainable group of His Majesty's subjects. This point I have already discussed. In the second place some element of permanence or stability in the group would have to be present before you can have an attempt to excite enmity against that group. You cannot say that people who are sitting in this room and people who are standing in this room are sufficiently well-defined classes for the purpose. A man who is standing this minute may be sitting down the next, and a man who is sitting down may stand up; so that the groups alter their composition before there is time for any feelings to be aroused on either side. Thirdly, there is the question of numbers. The group indicated must, I think, be sufficiently numerous and widespread to be designated "a class." You cannot say, for example, that "the three tailors of Tooley Street" form a class for the present purpose. The reason for this requirement is that unless a group is numerous and widespread the excitement of feelings against it is not likely to be of consequence from the point of view of the public tranquillity. Now, if the speaker meant to indicate by the word "capitalists" the "idle rich," it may be doubted if persons who answer to the description in Bombay, or even in India, are sufficiently numerous to form a class of the kind contemplated in the section. For all these reasons it seems to me that, as used by the accused in the present speech the terms "capitalist" and "imperialist" were not sufficiently precise and did not connote any well-defined class, and, as I have already said, the speech itself was not of the nature calculated to bring it within the mischief of the section.

Coming to S. 124-A, I find that the learned Magistrate has relied on four or five passages in the speech which he considers as sufficient to bring it within that section. The first passage which he refers to is in these terms :

> "This Government and the capitalists are sucking the blood of the labourers. We should fight with these people. What is needed is that we should unite in order to fight against the two enemies."

The learned Advocate-General greatly stressed the word "fight" and the word "enemies." But it seems to me that too much ought not to be made of metaphorical expressions which are not to be taken literally. Is not the learned Advocate-General himself fighting every day for his clients in Court? We hear of doctors and nurses fighting for the lives of their patients, and we also hear of legislators fighting on the floor of Parliament or of Legislative Councils against Bills clause by clause. In none of these cases does anyone understand by the word "fight" a physical conflict. The

word "fight" in common parlance often means only opposition and contention, and the case of the word "enemies" is very similar. People who are competitors in trade speak of one another as enemies. People whose interests in certain matters are adverse may also do so. We are not therefore to take it, because the word "enemy" has been used, that the speaker necessarily intended to inculcate feelings of enmity. The next passage which the learned Magistrate relies on is one in which the speaker contemplates the union of labourers for the purpose of striking work, and she says "then alone a tremendous movement will be created in India." I do not think that it is fair to read this last phrase as meaning revolution against the Government. We have been told that the word used by the speaker was 'andolan', which certainly does not mean revolution. It is a Sanskrit word meaning "swinging, trembling, oscillation" (Monier Williams' Dictionary), and as commonly used in Hindi means agitation. She does not say in that passage that this strike is meant to paralyse Government. The meaning attempted to be conveyed seems to be that such a strike would demonstrate the power of labour, and would lead to their getting what they want. The third passage which the learned Magistrate has referred to is this:

> "However powerful and rich Government and the capitalists may be, they possess weapons while the labourers do not. They (the labourers) do not possess fire-arms for shooting purposes. They have no police and no military. Even then their strength is greater than that of the capitalists and Government."

To say that this contains a suggestion that Government use fire-arms for shooting labourers, and the military and the police to crush them, is not, in my opinion, a fair reading of this passage. What the speaker is trying to show is that in spite of the weapons and the power of the capitalists and Government, labourers, if only they unite with each other, have greater power because of their overwhelming numbers. And to point out that fact as an incentive to unity is not, I think, to create either disaffection or hatred or enmity. In the next passage that the learned Magistrate refers to, the speaker says:

> "You people should not think that the strength of the labourers is little ; there is strength in the hands of the labourers ; everything is in the hands of the labourers ; for this reason (if) the labourers want to break the power of the capitalists and the imperialists, the labourers can break it in four days' time."

This is merely an amplification of the idea running through the passage which I have just commented on. The last passage which the learned Magistrate emphasises is the suggestion made by the speaker that labour leaders are sent to long terms of imprisonment while Congress people get only short terms of imprisonment. The learned Magistrate considered that this statement was bound to excite feelings of hatred and enmity towards Government, because he considered that Courts of law are an important branch of administration of Government. Now Government contemplated under S. 124-A has been held to be

> " the executive Government which under the Government of India Act is constituted to carry on the executive government of India and of the various provinces."

It is not correct to say that Government is concerned as such with the administration of justice by the Courts or the length of sentences awarded ny them. In fact it is one of its most important claims to the loyalty and affection of the people that the administration of justice is independent of the executive Government and untrammelled by extra-judicial considerations. It is therefore hardly right for the learned Chief Presidency Magistrate to read a criticizm on the sentences passed by the Courts as an attack on the executive Government. The aspersion made by the speaker in the passage under consideration might be an aspersion against the Courts which award heavy sentences to labour leaders or it might mean an aspersion against the legislature which passes laws, or against the Government for not taking steps to alter the state of the law which makes it possible for heavy sentences to be passed against people who lead labour. The suggestion is, to my mind, somewhat vague and does not carry any direct or pointed aspersion against the executive Government established by law in British India. As regards the advocacy to follow the path of M. N. Roy, I do not think it can be said that because M. N. Roy was convicted in respect of his political activities of the offence of waging war, it follows that any one who asked to follow his way in improving the conditions of labour must also wage war against the Government. As far as one

can gather from the speech itself, all that has gone before is directed towards exhorting labourers to combine in organized unions, so that labourers may be in a more favourable position for making their demands and obtaining redress. All that follows the suggestion to follow the way of Roy is also concerned with exhorting the hearers in favour of 'sangathan' which means union or organisation. There is no reference to any other method so that the only inference must be that that is what the speaker intended when she referred to the way of Roy. If any other method was meant she would have at least described it somewhere in her speech. On the contrary she has definitely rejected the method of the Bengal terrorists and so there is material in the speech itself to show that she did not mean the method of waging war against the Government when she referred to the way of Roy.

It appears therefore that the passages relied upon by the learned Magistrate will not, when examined, support the conviction. But it is said that the speech contains a gratuitous attack on Government inasmuch as it charges the Government as siding with the capitalists. I doubt whether such an aspersion could be held to excite disaffection against the Government if, as in the present case, it is made incidentally in the course of advocating a legitimate cause, and does not form as it were the burden of the song. But it is undoubtedly true that in making these exhortations it was quite unnecessary to bring in any reference to Government, and it is also true that the speaker has more than once referred to Government as an adversary, and said in effect that they are on the side of the capitalists. She has also used some strong expressions with regard to Government such as "enemies" and "sucking blood." But, speaking for myself, I should be inclined to hold that these expressions that were uttered in the excitement of the moment were not necessary to the substance of her argument, and that some allowance should be made in the interests of freedom of discussion. But I can realise that it is possible to hold otherwise. The speech at any rate comes near the border line of what is permissible, and the section, which we are now considering, S. 124-A, I. P. C., is a wide and all-embracing section. The learned Chief Justice, while agreeing that the speech should be read as a whole and that undue weight should not be given to metaphorical expressions has come to the opinion that the speech does transgress the limits laid down by the law, and his opinion is entitled to and must receive the greatest deference and respect. I do not think therefore that I should formally differ on this narrow question so as to have the case sent before a third Judge and be argued over again for another couple of days especially in view of the fact that we propose to reduce the sentence to one of fine only in the present case. I therefore agree in the order proposed.

V.S. *Order accordingly.*

A. I. R. 1933 Bombay 71

BEAUMONT, C. J. AND BLACKWELL, J.

Teju Kaya & Co.—Appellant.

v.

Gangji Nensey & Co.—Respondent.

Original Civil Appeal No. 13 of 1932, Decided on 19thS eptember 1932, against decision in Suit No. 207 of 1926.

(a) Contract Act (1872), S. 55—Contract of sale of immovables—Nature of property is factor in determining if time was essence—Time is not usually essence in sale of lease-holds.

The nature of the property is one of the matters which has to be taken into consideration in determining whether time should be treated as of the essence of the contract. In the case of a sale of certain properties, as for instance a reversion or a business, it is established that in the absence of anything to the contrary in the contract, time is deemed to be of the essence of the contract. But, that rule does not apply to the sale of lease-holds with a comparatively short term to run but it is a matter to take into consideration in determining whether time was originally intended to be of the essence of the contract, and if it was not, in determining the amount of delay which it may be right to allow in carrying out the contract. [P 73 C 1, 2]

(b) Specific Relief Act (1877), S. 12—Claim for specific performance by vendor—He must have been ready and able to perform his part—Consent of third person necessary but not obtained—Vendee repudiating contract — Vendor's claim cannot be sustained — Specific Relief Act (1877), S. 18 (b).

In order to entitle the vendor to an order for specific performance it is necessary for him to aver and prove that at the date when he raised his claim for specific performance he was in a position, that is to say, was ready and willing to carry out his part of the contract. If the carrying out of the contract requires the consent of the lessor of the property contracted to be sold, the vendor must obtain that consent before he

can maintain his action and any notice of repudiation by the vendee will not absolve the vendor from the necessary conditions: *Ellis* v. *Rogers*, (1885) 29 *Ch D* 661, *Dist.*; *Stickney* v. *Keeble*, (1915), *A C* 386, *Rel on.* [P 74 C 1]

(c) Specific Relief Act (1877) S. 18—Contract of sale of immovables—Vendee performing his part but not vendor—Return of purchase money can be claimed.

A contract of sale of immovable properties was to be performed within a c rtain time but time was not of the essence of contract. The vendee did everything that he had to do but the vendor was not in a position to carry out the contract which disentitled him to claim specific performance.

Held: that the vendee was entitled to avoid the contract and claim return of purchase-money. [P 76 C 1]

N. P. Engineer, *Jamshed Kanga*, *Advocate-General* and *M. C. Chagla*—for Appellants.

F. J. Coltman and *C. K. Daphtary*—for Respondents.

Beaumont, C. J.—This is an appeal from a decision of Mirza, J. The suit is a suit by the purchasers of immovable property claiming to recover the purchase money which they paid under the contract, on the ground that the vendors did not complete the contract within due time. The contract is dated 1st November 1924 (Ex. B). The vendors are a firm called Gangji Nensey & Co., which was apparently a partnership in which there were two partners, one of them the defendant Premji Bhojpal and the other Passu Nensey. Under the contract, which is Ex. B, the vendors agreed to sell to the purchasers certain leasehold property being a godown of the Port Trust, the purchase money being Rs. 30,000, and the contract shows that the whole of the purchase money was paid on the date of the contract and the purchasers were to be given possession. Then the contract says:

"As regards the pucca documents we are to get the same registered etc., in your favour within six months from this date."

The purchasers were in fact given possession either at the date of the contract or soon after. The property which was the subject-matter of the contract was a lease of this godown from the Port Trust for a term of 25 years from 25th December 1915, and the lease contained a covenant against assigning the demised premises without the consent in writing of the trustees of the Port Trust. Under the contract it is, in my opinion, clear that the vendors were liable to obtain the consent of the landlords to the assignment, there being nothing in the contract to alter the general law on that subject. But it appears that by arrangement between the parties the purchasers did in fact attempt to get the consent of the lessors to the proposed assignment. There is nothing in the evidence to suggest that they released the vendors from their obligation under the contract to get that consent; they only arranged as a matter of convenience to themselves to endeavour to get the consent. In pursuance of that arrangement the purchasers entered into correspondence with the Trustees of the Port trust on 9th March 1925, and eventually by a letter of 7th April 1925, the Trustees of the Port Trust took the point that, as one of the vendors, viz., Passu Nensey, had died on 20th January 1925, it would be necessary for representation to his estate to be taken out, and for his personal representative to join in the assignment. That contention of the Port Trust may have been justified having regard to the provisions of S. 45, T. P. Act. At any rate, whether rightly or wrongly, the trustees of the Port Trust did raise the objection that the representative of Passu Nensey must join in the assignment. After that requisition had been made, the purchasers referred the matter to the vendors, and told them that they must arrange for representation to be taken out to Passu Nensey's estate. That was done admittedly about the middle of April and it seems to me impossible to say that the vendors had been guilty of any improper delay up to that time, because the purchasers had themselves chosen to take the matter out of the hands of the vendors. After receiving this request to arrange to take out representation to Passu Nensey's estate, the vendors did not question their obligation to comply with it, and according to the evidence of the defendant Premji Bhojpal he communicated with the widow of Passu Nensey, who was residing in Cutch. He tried to get her to take out letters of administration to her deceased husband's estate, but she refused though she eventually agreed that Premji Bhojpal as a creditor should himself apply for letters of administration. On 21st June the vendors by a letter informed the purchasers that the draft of a petition for letters of administration had been prepared and would be declared

in a day or two. It is I think, not possible to say that down to that date there had been any unreasonable delay on the vendor's part. They had taken about two months in which to communicate with the widow and ascertain that she refused herself to act and to get her permission for one of the creditors to act, and seeing that she was residing in Cutch, I do not think two months' delay can be said to have been unreasonable. On 21st July the purchasers wrote to the vendors saying that:

> "unless within one month from the date hereof, time being hereby made of the essence of the contract, your client do everything needful to obtain letters of administration and the sanction of the Port Trust to the sale and otherwise carry out the agreement and complete the sale our clients will without any further intimation cancel the contract and will file a suit to recover from your clients the sum of Rs. 30,000."

And on 26th August the purchasers gave notice cancelling the contract. On 7th December the vendors gave to the purchasers notice that they were ready and willing to complete the contract and offered to get the sanction of the Port Trust to the assignment, letters of administration to Passu Nensey's estate having by them been obtained by the defendant Premji Bhojpal. The first question which we have to determine is whether time was of the essence of this contract. If it was not, then we have to consider whether the vendors had been guilty of unreasonable delay by 21st July. If they had, then we have to consider further whether the purchasers' notice given on that day was a reasonable notice. With regard to the first point as to whether time was of the essence of the contract it is not expressed to be so in the contract, but Mr. Engineer on behalf of the appellant has contended that we should treat time as of the essence having regard to the nature of the property agreed to be sold. No doubt the nature of the property is one of the matters which has to be taken into consideration in determining whether time should be treated as of the essence of the contract. In the case of a sale of certain properties, as for instance, a reversion or a business, it is established that, in the absence of anything to the contrary in the contract, time is deemed to be of the essence of the contract. But, in my opinion, that rule does not apply to the sale of leaseholds, although undoubtedly the fact that the property is leasehold with a comparatively short term to run is a matter to take into consideration in determining whether time was originally intended to be of the essence of the contract, and if it was not, in determining the amount of delay which it may be right to allow in carrying out the contract. Here it is very important to observe that at the date of the contract the whole of the purchase money was paid and possession was given, and it appears to me therefore that it really made very little difference to the purchasers whether the matter was completed by a formal assignment within six months as provided by the contract, or within any reasonable time thereafter. The matter would only become one of urgency if the purchasers desired to dispose of the property and to show a good title, and there is no evidence that the purchasers desired to dispose of the property. I think therefore that time in this case was not of the essence of the contract.

Upon the second question I have already said that in my judgment the vendors were not guilty of any unreasonable delay in carrying out the contract, at any rate by 21st June. They had informed the purchasers on that date that the application for letters of administration to the estate of Passu Nensey was going through, and the delay after that was such as was inevitable in obtaining a grant of letters of administration. In my view by 21st July there had been no unreasonable delay on the part of the vendors, and the purchasers were not justified in serving a notice making time of the essence of the contract, and if that is so, it is not necessary to consider whether the notice served was reasonable. But I may say that, having regard to the fact that time was necessarily required to take out letters of administration, and to the further fact that there is no evidence that it made any substantial difference to the purchasers whether their title was completed promptly or not, I think that a month's notice was unreasonably short.

So far therefore I agree with the learned Judge in thinking that time was not originally of the essence, and that the purchasers had not effectively made it of the essence at the date when they filed this suit, which was 22nd January 1926. But at that point it seems to me

considerable difficulty arises. The defendants on 26th April 1926, put in a counter-claim asking for specific performance, and the learned Judge gave them a decree on that counter-claim. In my opinion, that portion of the decree was wrong, and the vendors were not entitled to an order for specific performance. In order to entitle themselves to an order for specific performance, it was, I think, necessary for the vendors to aver and prove that at the date when they raised their claim for specific performance they were in a position, that is to say, were ready and willing, to carry out their part of the contract. In the written statement which is repeated in the counter-claim the defendants say in para. 2 :

"These defendants submit that the transaction was to all intents and purposes a complete sale and the defendants had only to sign a formal purchase document when tendered and admit execution thereof before the sub Registrar Soon thereafter. These defendants say that the plaintiffs had undertaken to do the needful in the matter and to obtain the necessary consent of the lessors and to get the draft lease approved by them."

It is true that in para. 12 the defendants say that they are and always have been ready and willing to perform their part of the contract, but it seems to me that, reading their written statement as a whole, they have stated that they regard the obtaining of the consent of the lessors as part of the plaintiffs' part of the contract, and not their own part. Therein I think they were wrong. It follows that we have not got any allegation by the vendors that they were ready and willing to do that which we hold that they were bound to do under the contract, that is, to obtain the consent of the lessors. Not only do the defendants not aver that they had obtained the consent, or were in a position to obtain the consent, of the lessors, but in point of fact no evidence whatever was given that such consent has been obtained, and indeed I gather that in fact the consent has not been obtained. It seems to me therefore that the defendants are not entitled to an order for specific performance.

Mr. Coltman has contended that he is so entitled on two grounds. In the first place, he says that if the defendants failed to obtain the consent of the lessors to the assignment, their failure was due to the fault of the plaintiffs, because he says the plaintiffs have retained the original lease and the draft assignment which they got back from the Port Trust authorities. No such allegation is made in the written statement which, as I have said, claims that it was the plaintiffs' duty to get the consent, and does not suggest that they prevented the defendants from getting such consent. But in any case the allegation is not, in my opinion, proved. So far as the original lease is concerned, I understand that the plaintiffs have in fact retained it, but they have never been asked to return it, probably because the defendants were afraid of such request being interpreted as acquiescence on their part in the plaintiffs' claim to repudiate the contract. It is obvious that the plaintiffs, on repudiating the contract, could not have objected to return the lease had they been asked to do so. With regard to the draft assignment, it is true that in their letter of 5th November 1925, the defendants' solicitors say:

"We are now instructed to request you to forward the said draft to the Port Trust authorities after making the necessary amendment therein and obtain their necessary approval and sanction;"

and that request does not appear to have been complied with. But I cannot see that there was any particular virtue in the draft assignment which had already been sent to the Port Trust authorities and returned. In any event it would require substantial amendment by adding the representatives of Passu Nensey, and I have no doubt whatever that if the vendors had sent to the Port Trust authorities the original lease, after obtaining it back from the purchasers together with a proper draft assignment, the authorities would have said whether or not they were prepared to consent to the assignment.

Then the second point taken by Mr. Coltman is that in view of the repudiation of the contract by the plaintiffs, the time to obtain the license had not arrived, and he relies on the case of *Ellis* v. *Rogers* (1). That was originally a suit for specific performance of an agreement by the defendant to purchase a certain interest in land from the plaintiff; but it appears that before the suit came on for hearing the plaintiff had had to resume possession of the land and build upon it, and therefore he confined his claim at the hearing to a claim for dama-

1. (1885) 29 Ch D 661=53 LT 377.

ges. Kay, J., held that inasmuch as the plaintiff had not at the date, when he commenced his action obtained the license of the landlord to the sale, which license was required, he was never ready and willing to perform his part of the contract, and that his action must fail. The Court of appeal decided the case on another ground. All the three learned Lord Justices, however expressed disagreement with the decision of Kay, J., as to the necessity for obtaining a license from the landlord. But, as far as I can see, their disagreement was based on the ground that the action had become one for damages. Bowen, L. J., says (p. 669):

"This is an action for repudiating the contract, and it is no answer to say that the plaintiff had not done something he was bound to do, unless he refused to do it, so as to repudiate the contract."

And Cotton, L. J., in his judgment says (p. 671):

"The vendor up to the time when the purchaser refused to go on, had been ready and willing to do all that was required to be done by him up to that time, and the proceedings had not reached the stage when it was necessary for him to be furnished with a license to assign."

If the action were an action for damages, it may well be that different considerations would apply : see particularly the judgment of Lord Atkinson in the case of *Stickney* v. *Keeble* (2). But it seems to me that in an action for specific performance the time to allege that the plaintiff has obtained the license necessary to enable him to carry out his part of the bargain is the date at which he commences his action. I think therefore that, that second ground of Mr. Coltman also fails. The position then which arises is this : at the time when the plaintiffs started their action to recover their purchase money they had not made time of the essence of the contract; but on the other hand at that date, and also at the date when the vendors put in their counter-claim, the vendors were not in a position to carry out their part of the contract and were not therefore entitled to an order for specific performance. The question is, what is the result in law arising from that position? The law on the subject is dealt with in the judgment of Lord Parker in *Stickney* v. *Keeble* (2) to which I have referred, that judgment being expressly approved of by Earl Loreburn and Lord Mersey and in no way disapproved by the other Law Lords. That was a case, like this, of a purchaser suing to recover his deposit on the ground that the vendor had been guilty of unreasonable delay, and that the purchaser had validly determined the contract. Lord Parker dealt with the principles on which Courts of equity act in departing from strict stipulations as to time. He points out that equity, if it could do so without doing injustice to the parties, did not hold them to their strict stipulation as to time, and he then discusses the principle on which equity acts in such cases. He says (p. 416):

"Prior to these (i. e. the Judicature) Acts the vendor could have only obtained relief from the consequences of his failure by filing a bill for specific performance and for an injunction restraining the action. On such a bill he could have obtained no relief unless he were himself able and willing to make a title to the purchaser."

And then he points out that in that particular case the vendor had after institution of the action put it out of his power to complete the sale by selling the property to third parties, and then he goes on (p. 416):

"It seems to me that on this ground alone the bill must have failed. An injunction, if granted, would not have been incident to, and in aid of, the equitable remedy of specific performance, but a means of enabling the vendor to forfeit the purchaser's deposit; in other words, to exercise a right which, if it existed at all, was a legal right, and this would be contrary to the principles upon which the Court of Chancery has always acted."

It seems to me to follow from that judgment that if the vendor is not entitled to the relief of specific performance, no doubt, with such variation as to time as the Court may think right, there is no equitable ground upon which the Court can prevent the purchaser from taking advantage of the vendor's breach of the stipulation in the contract as to time for completion.

I have dealt with the question so far under the English law, but provisions as to time in relation to contracts in India are contained in S. 55, Contract Act. That section provides in substance that if the intention of the parties was that time should be of the essence of the contract, then if the contract is broken as to time the promisee has an option to avoid the contract ; but that if it was not the intention of the parties that time should be of the essence of the contract,

2. (1915) A C 386=84 L J Ch 259=112 L T 664.

the contract does not become voidable by the failure to do the thing required at or before the specified time, but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. I take it that the first part of the section includes both the case of time originally being made of the essence, and the case of time becoming of the essence having regard to what subsequently takes place under the contract, and I apprehend that a vendor suing for specific performance must be taken, at any rate in the absence of a claim to special relief in his pleading, to admit that the time for completion has arrived. However it is not necessary to pursue that subject, because it is settled, in my opinion, by the decision of the Privy Council in *Jamshed Khodaram* v. *Burjorji Dhunjibhai* (3) that the rules laid down in S. 55, Contract Act, do not vary from the English rules, and that the section lays down no principle which differs from those which obtain under the law of England as regards contracts to sell land. That decision was given very soon after the decision of the House of Lords in *Stickney* v. *Keeble* (2) which is referred to in the judgment of the Privy Council. We are therefore in my opinion bound to apply to this case the same rules as would be applicable under English law.

It seems to me that the vendors having failed to prove that they are entitled to specific performance have no answer to plaintiffs' claim for the return of the money. That being so, I think that the appeal must be allowed with costs and judgment must be given in favour of the plaintiffs for the amount claimed. I reach this conclusion with some reluctance, because I think from the correspondence that the conduct of the purchasers has throughout been unreasonable, and that they were from the start endeavouring to take advantage of the difficulty which arose from the Port Trust requiring representation to the estate of Passu Nensey in order to escape from a contract which they no longer wished to perform. But unfortunately for the vendors they failed to put themselves into a position to take advantage of the rights which they at one time possessed.

3. A I R 1915 P C 83=32 I C 246 = 43 I A 26 =40 Bom 289 (P C).

Blackwell, J. — I agree and do not desire to add anything.

M.N. *Appeal allowed.*

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BEAUMONT, C. J. AND BLACKWELL, J.

Hiralal Thakoredas Parekh—Appellant.

v.

Chhotalal Mulchand—Respondent.

Original Civil Appeal No. 23 of 1932, Decided on 26th September 1932, against decision in Suit No. 58 of 1931.

Bombay Securities Contract Control Act (8 of 1925), S. 6—Stock Exchange Rules, R. 176—R. 176 applies to contract between principal and principal and not between principal and broker.

Rule 176 does not apply to transactions between a member of the exchange and a clerk of another member where the relationship is merely that of principal and broker. R. 176 only deals with contracts as between principal and principal. [P 77 C 2]

K. T. Desai and *M. L. Manekshah*—for Appellant.

Jamshed Kanga and *M. P. Amin*—for Respondent.

Beaumont, C. J. — In this case the plaintiff sues the defendant on a promissory-note dated 14th January 1928, for a sum of Rs. 9,000 odd. The promissory note is Ex. A, and it is given by the defendant to one Vajifdar, by whom it was endorsed in favour of the plaintiff. The defence of the defendant is that the promissory note was given in respect of the balance due by the defendant to Vajifdar in respect of transactions carried out by the latter on the Native Share and Stock Exchange, and he says that those contracts under the rules of the Exchange were void, and consequently no action will lie on a promissory note given in respect of that consideration. He further says that the plaintiff was at all material times a clerk of Vajifdar and knew the nature of the transactions between Vajifdar and the defendant, and knew that those transactions were invalid, and therefore the plaintiff is not a holder in due course. The first question to determime is whether there is any invalidity in the promissory note, having regard to the transactions on the Native Share and Stock Exchange. The Bombay Securities Contracts Control Act, 1925, provides for the recognition of Stock Exchanges, and the Native Share and Stock Brokers' Associ-

ation has been recognized under that Act. Then in S. 6 the Act says :

"Every contract for the purchase or sale of securities, other than a ready delivery contract, entered into after the date to be notified in this behalf by the Governor-in-Council shall be void unless the same is made subject to and in accordance with the rules duly sanctioned under S. 5 and every such contract shall be void unless the same is made between members or through a member of a recognized stock exchange.". . . . .

The contention of the defendant is that the contracts in this case were not in accordance with the rules of the Stock Exchange. It is not disputed that at the material dates Vajifdar was a member of the Stock Exchange and the plaintiff was his authorized clerk. It is also not disputed that the defendant was the authorized clerk of one Marfatia. R. 52 provides that a member may employ four authorized clerks, who are not members of the association. Then R. 54 (a) provides that an authorized clerk may make bargains on behalf of his employer, but shall not make bargains in his own name or sign contract notes in his own name or on behalf of his employer. Then R. 54 (b) provides :

"A member shall be liable for all acts done and all bargains made on his behalf by any authorized clerk employed by him and he shall fulfil such bargains according to the rules of the Association in the same manner as if such bargains had been made personally by him."

Then R. 59 (a) provides :

"An authorized clerk shall not transact any business on behalf of any member other than his own employer."

Then we come to the heading in big type "Bargain in the market," and a sub-heading under that is, "Dealing with clerks prohibited." Then R. 176 says :

"A member shall not transact any business or make any bargain for anyone in the employment of another member and any business transacted or any bargain made by a member with a clerk of another member shall be for the account of such member."

Now it is said by Mr. Desai on behalf of the defendant that the transactions in this case infringed that last rule, because Vajifdar entered into a transaction for the defendant, who was in the employment of another member. The rule is not very happily worded, and I am inclined to think that the words "for any one" should be read as "with any one." On the whole, I have come to the conclusion that the view taken by the learned Judge is the right view, and that that rule does not apply to transactions between a member of the Exchange and a clerk of another member where the relationship is merely that of principal and broker. It only, I think, deals with contracts as between principal and principal. The second part of the rule supports that view. In this case Vajifdar was employed as a broker of the defendant, and they were not dealing in the relationship of buyer and seller ; and it is to be observed that S. 6, Bombay Securities Contracts Control Act (Bombay Act 8 of 1925) only makes contracts for the purchase or sale of securities void. I think therefore that the transactions in this case were not either void or illegal, and therefore there is no defence to the plaintiff's claim on the promissory note. It is therefore unnecessary to consider the further question, which was to some extent argued, as to whether, if the transactions in this case had infringed R. 176, the consideration for the promissory note would have been void or illegal, and what the consequence of the consideration being either void or illegal would be. For these reasons I think the appeal should be dismissed with costs.

Blackwell, J. — I agree and have nothing to add.

R.K. *Appeal dismissed.*

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PATKAR AND MURPHY, JJ.

Ramgopal Hajarimal Marwadi—Appellant.

v.

Jaitunbai Yasinbhai—Respondent.

Second Appeal No. 299 of 1931, Decided on 11th August 1932, against decision of Asst. Judge, Ahmednagar, in Appeal No. 235 of 1929.

Succession Act (1925), S. 263—Revocation of probate — Will alleged to be forgery — Value of subject-matter is value of property for which probate was granted and not applicant's interest — Bombay Civil Courts Act (1869), S. 28-A.

In an application for cancellation of the probate on the ground that the will is forged, the specific thing sought by the plaintiff is not divisible as in a partition suit. The subject matter in such an application is therefore decided by the value for which the probate was granted and not the value of the interest of the applicant: 8 Bom 31 and 32 *Bom* 634, *Ref.* [P 78 C 2; P 79 C 1]

H. C. Coyajee and *J. G. Rele*—for Appellant.

K. A. Padhye—for Respondent.

Patkar, J.—In this case a probate was granted on 15th January 1920, to the

appellants in respect of property worth Rs. 6,680. The appellants were appointed executors of the deceased testator by his will dated 17th April 1918. The present application was made by the respondent for revocation of the probate under S. 263, Succession Act 39 of 1925, on the allegation that the will was a forgery. The learned First Class Subordinate Judge, acting under the powers conferred by S. 28-A, Bombay Civil Courts Act, dismissed the application on the ground that in his opinion he was not satisfied that the will was a forgery. On appeal, the learned Assistant Judge came to the conclusion that the will, Ex. 141, was not a genuine will of the deceased Narsingdas, and therefore allowed the application and cancelled the probate already granted. A preliminary point was raised before the learned Assistant Judge that the appeal did not lie to the Assistant Judge under S. 28-A, Bombay Civil Courts Act 1869. Sub-S. (2), S. 28-A, makes a provision with regard to appeals as follows:

"Every order made by a Subordinate Judge by virtue of the powers conferred upon him under sub-S. (1) shall be subject to appeal to the High Court or the District Court according as the amount or value of the subject-matter exceeds or does not exceed five thousand rupees."

The learned Assistant Judge held that property covered by the will was worth more than Rs. 5,000, as in the probate granted by the Court the property was valued at Rs. 6,680. But the learned Assistant Judge was of opinion that as the appellant was concerned with only one of the survey numbers out of the property covered by the will, which was worth Rs. 1,600, she was entitled to put the valuation on the property to the extent to which her interest was affected by the grant of the probate. The value of the subject-matter of a probate application is the estate which is the subject of the probate application. In *Laxmi* v. *Aba* (1), where the precise point decided was that in so far as the provisions of the Probate and Administration Act are inconsistent with the amendments introduced into the Bombay Civil Courts Act, the provisions of the first-mentioned Act must be taken to have been impliedly repealed, it was also incidentally remarked that the value of the subject-matter represented the value of the estate which was the subject of the probate application. Under S. 273, Succession Act of 1925, probate or letters of administration shall have effect over all the property and estate, moveable or immovable, of the deceased, throughout the province in which the same is or are granted. If the probate has the effect over all the property comprised in the probate, the subject-matter of an application to revoke the probate would extend to the whole property covered by the probate. It is difficult to divide the subject-matter of such an application in proportion to the interest acquired by the applicant. There is no provision for a limited revocation of the probate especially when it is sought on the ground that the will is forged. Though according to the decision in *Lakshman Bhatkar* v. *Babaji Bhatkar* (2) the subject-matter of a claim within the meaning of S. 25, Bombay Civil Courts Act 14 of 1869, is the specific thing sought by the plaintiff, yet it is clear that in an application for cancellation of the probate on the ground that the will is forged the specific thing sought by the plaintiff is not divisible as in a partition suit.

We think therefore that the subject-matter of the application, which aimed at and would result in the cancellation of the whole probate, extended over the whole property comprised in the probate which was of the value of Rs. 6,680, and therefore exceeded Rs. 5,000, and the appeal would lie not to the District Court but to the High Court. No other point was raised in this appeal. We think therefore that the decree of the lower Court must be set aside on the ground that it had no jurisdiction to hear the appeal, and we must direct the District Judge to return the appeal for presentation to the proper Court. The appellants to get the costs of this appeal from the respondent.

Murphy, J.—The only question we have to decide is the value of the subject-matter of an application to revoke the probate of a will, for on this depends the answer to the question whether the Assistant Judge, who revoked the probate, had jurisdiction to do so, and to hear the appeal from the decision of the First Class Subordinate Judge, who refused the application. The estate was that of a religious mendicant, the executors had applied for probate, and it

1. (1903) 32 Bom 634=10 Bom L R 924.

2. (1883) 8 Bom 31.

was originally granted them to the value of Rs. 6,680. The applicant, now respondent, was a purchaser of one of the properties covered by the will, from one Raghunathdas, who claiming to be the deceased's "chela" and heir sold it to her husband for Rs. 1,600. Under the will, the property was not vested in this person, and the applicant valued her claim at Rs. 1,600, which was the price paid for the land. But it is evident that the probate was granted as a whole, and there is no provision for a limited revocation in the Act, and can hardly be one in the case of a revocation on the ground of forgery. If the probate was to be revoked, it would have so to be as a whole, and the subject-matter in such an application must therefore be decided by the value for which the probate was granted. I agree that the learned Assistant Judge had no jurisdiction to hear the appeal, and that he should return the memorandum of appeal for presentation to the proper Court.

R.K. *Decree set aside.*

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BEAUMONT, C. J. AND NANAVATI, J.

Vallibhai Ibrahim—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 179 of 1932, Decided on 3rd August 1932, against order of Addl. Magistrate, First Class, Ahmedabad.

(a) Bombay Prevention of Gambling Act (1887), S. 6—Complaint on oath mentioned in warrant—Omission to state suspicion that house is used as gaming house—Still warrant is valid—Evidence Act (1872), S. 114.

It is usually desirable that a warrant issued under the terms of a particular statute should show on its face that the conditions precedent required by the statute have been complied with but it is not always essential that the warrant should so show.

Where therefore a warrant under S. 6 states that a complaint on oath has been made but does not state that the officer who issued the warrant had reason to suspect that the house in question was used as a common gaming house, the warrant is a valid warrant under S. 6. [P 79 C 2]

(b) Bombay Prevention of Gambling Act (1887), S. 6 — Property to be searched wrongly described—Warrant is bad—If description partly good and partly bad, bad part may be rejected.

If the warrant wrongly described the property to be searched, then it is a bad warrant. But a description may be good in part and bad in part, and it may be possible for the Court to reject the bad part on the principle of "*falsa demonstratio non nocet.*" [P 80 C 1]

G. N. Thakor and *B. G. Thakor*—for Accused.

P. B. Shingne—for the Crown.

Beaumont, C. J.—This is an application in revision in which the accused persons ask us to set aside their convictions under the Bombay Prevention of Gambling Act No. 4 of 1887. The learned Magistrate held that the burden was upon the accused to prove their innocence, relying upon the presumption against the accused which is raised by S. 7 of the Act. Now the learned Magistrate was quite right in raising that presumption if the premises of the accused had been searched under a warrant lawfully issued under S. 6 of the Act, but the presumption under S. 7 does not arise unless there has been a proper search warrant under S. 6. It is said that the warrant of search purported to be issued in this case under S. 6 is invalid on two grounds. In the first place it is said that the warrant, although it states that a complaint on oath has been made, does not state that the Assistant Superintendent of Police who issued the warrant had reason to suspect that the house in question was used as a common gaming house, that is to say, that the warrant does not show on the face of it that the conditions precedent under S. 6 have been complied with. In my opinion there is no validity in the objection. It is I think, usually desirable that a warrant issued under the terms of a particular statute should show on its face that the conditions precedent required by the statute have been complied with, but it is not in my view essential that the warrant should so show. There is a presumption under S. 114, Ill (e), Evidence Act, which enables us to presume that the officer issuing the warrant has performed his duty correctly, and until that presumption is displaced, it is not, in my opinion, necessary for the officer to give any evidence in the matter. In point of fact merely stating on the warrant that particular things have been done would not afford any evidence that those things had been done.

The other point taken is that the warrant incorrectly describes the house searched. The warrant recites that a complaint on oath has been made that a house situate in census Nos. 4082 and

4083 in Kalupur Motimakeriwad and which is occupied by one Valibhai Ibrahim (who is accused 1) is used as a common gaming house. Now, in point of fact the two census numbers which were searched were census Nos. 1021 and 4082. It appears that on the first floor of this house are census Nos. 1021 and 4082, and on the ground floor are Nos. 1022 and 4083, and the warrant was intended to apply to the first floor, that is to say, Nos. 1021 and 4082, which are proved to be in the occupation of accused 1. It is, I think, clear on the authorities which Mr. Thakor has cited that if the warrant wrongly described the property to be searched, then it is a bad warrant. But a description may be good in part and bad in part, and it may be possible for the Court to reject the bad part on the principle of "*falsa demonstratio non nocet.*" The learned Government pleader suggests that we can do that here. He says that the property is described as census Nos. 4082 and 4083 occupied by accused 1, and he says that the governing part of the description is the statement of the occupation of the premises by accused 1, but I do not take that view. It is proved that No. 1021, which was the particular room in which the gaming instruments were found, is occupied by accused 1, but it is not proved that he does not occupy other numbers in the street, and it is not proved that he does not occupy 4082. It is not therefore proved that the description 4082 and 4083 occupied by accused 1 is an inaccurate description of any premises, and until it is shown that the description used is inaccurate in part no case for applying the maxim *falsa demonstratio non nocet* arises. I think therefore we have got here a warrant which incorrectly describes the premises to be searched and therefore the search of the room No. 1021, which is not included in the warrant is not a search in respect of which any presumption can arise under S. 7 of the Act. That being so, I think the learned Magistrate was in error in putting the burden of proof upon the accused, and I think the conviction must be set aside.

Nanavati, J.—I agree.

R.K. *Order accordingly.*

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* A. I. R. 1933 Bombay 80

BEAUMONT, C. J. AND BLACKWELL, J.

Dhanraj Keshrimal Jhalani—Appellant.

v.

H. H. Wadia—Respondent.

Original Civil Appeal No. 6 of 1932, Decided on 28th September 1932, from I. C. No. 14 of 1926.

* **(a) Company — Forfeitures of shares—Company cannot reinstate share-holder without his consent.**

Where forfeiture of shares of a person take effect, the company cannot reinstate him as a share-holder without his consent: *Larkworthy's case*, (1903) 1 *Ch* 711, *Foll.* [P 81 C 1]

(b) Company — Call — Resolution for call without fixing time or place of payment is valid.

It is not necessary for a resolution making the call to specify time for payment or the person to whom or the place where the call is to be made: *Johnson* v. *Lyttles Iron Agency*, (1877) 5 *Ch D* 687, *Foll.*; *English case law reviewed* [P 82 C 2]

(c) Company—Call—Resolution of directors is not necessary—Even if necessary parties can waive irregularity.

It is not necessary to have a formal resolution of the directors specifying the person to whom, and the place where, a call is to be made, when the agents sign in the notice of calls "by order of the board' as there is the presumption that the agents act properly. And even if such a resolution is necessary it is a matter which the parties can waive. [P 83 C 2; P 84 C 1]

(d) Company — Call—Irregularity—Forfeiture acted upon for two years cannot be set aside.

Where a company without any resolution forfeits the share of a person and such person does not challenge the forfeiture and the company enforces the forfeiture for two years, the irregularity should be deemed to have been waived and the company cannot set aside the forfeiture. [P 84 C 1]

Jamshed Kanga, F. J. Coltman and *V. F. Taraporewala*—for Appellant.

M. C. Setalvad—for Respondent.

Facts.—The Official Liquidator of the Rutlam Bombay United Spinning and Weaving Co., Ltd. (in liquidation) applied to the Judge in winding up to settle the list of contributories of the company and to include therein the name of the present appellant as the holder of 450 shares. Kania, J., made the order asked for. Further facts will be clear from the judgment.

Beaumont, C. J.—(His Lordship set out the facts of the case and then proceeded.) The claim of the company is a startling one. In the most formal manner the company purported to forfeit the appellant's shares, and thereby to terminate the contractual relations between

the company and the appellant, and for some two years they acted upon the view that the forfeiture was valid. They now seek to set aside the forfeiture, and to restore the contractual relations between the company and the appellant, on the basis of their own default in carrying out the forfeiture. It is clear that if the forfeiture took effect, the company cannot reinstate the appellant as a share-holder without his consent: see *Larkworthy's* case (1), but the ground on which the company put their case, and the only ground on which in my opinion it can be put, is this: a forfeiture of shares, which involves reduction of the company's capital, can only be carried out under the Articles of Association of the company where a call has been validly made, and that call has not been paid; in the present case no call was validly made; the forfeiture was therefore outside the powers of the company and invalid, and the appellant has in fact never ceased to be a share-holder of the company. The first and principal question which we have to determine on this appeal is whether the second and third calls; were validly made, and for that purpose it is necessary to look at the Articles of Association. The material articles, which appear to be founded on Palmer's Company Precedents, are Arts. 18, 19, 20 and 24, which are in the following terms:

"18. The directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively, and not by the conditions of allotment thereof, made payable at fixed times, and each member shall pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. A call may be made payable by instalments.

19. A call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed.

20. Seven days' notice of any call shall be given specifying the time and place of payment, and to whom such call shall be paid.

21. If any member fails to pay any call or instalment on or before the day appointed for the payment of the same, the directors may at any time thereafter, during such time as the call or instalment remains unpaid, serve a notice on such member requiring him to pay the same together with any interest that may have accrued and all expenses that may have been incurred by the company by reason of such non-payment."

1. (1903) 1 Ch 711=72 L J Ch 387=88 L T 56=10 Manson 191.

Dealing with these articles in the first instance, apart from authority, it appears to me that Art. 18 deals with two distinct matters: the first part authorizes the directors to make calls, and the second part provides what the liability of the member is to be in respect of the calls so made and stipulates that he is to pay the amount of the call made on him to the persons and at the times and places appointed by the director. As a matter of construction I can see no justification for reading the conditions necessary to impose liability to pay upon the member into the first part of the article authorizing the directors to make a call. It seems to me that the directors may (as they did in this case) pass a resolution making a call of a particular amount payable at a particular time, and that that resolution constitutes a valid call and fixes the date of the call, although before the payment of the call can be enforced the directors must appoint the persons to whom and the place where the call is to be made. That seems to me the natural meaning of the language of Art. 18, but the contention of the company is that Art. 18 read as a whole requires that any resolution for a call must state not only the amount of the call and the time at which it was payable, but the person to whom and the place where it is to be paid. We have been referred to many authorities of which the following seem to me to be in point.

In *The Newry and Enniskillen Ry. Co.* v. *Edmunds* (2), before Pollock, C. B., Parke, B., and Pratt, B., the company was governed by the Company's Clauses Consolidation Act (8 & 9 Vic. c. 16), and it appears to me that the S. 22 of that Act is substantially in the same terms as Art. 18 in the present case. In that case the directors had made a call, but the resolution contained no time or place for payment. The Court held that the call was validly made. Parke, B., who gave the leading judgment, expressly states that the resolution to make a call need not specify either the time or place for payment, but the directors must appoint a time and place which must be notified to the shareholder by a notice allowing him twenty-one days for the purpose of payment. There are two cases: *The Great*

2. (1848) 2 Ex 119=5 Ry Cas 275=17 L J Ex 102.

North of England Ry. Co. v. *Biddulph* (3) and the other *The Sheffield, Ashton under Lyne and Manchester Ry. Co.* v. *Woodcock* (4), in both of which the judgment was given by Parke, B., and which support to some extent the conclusion reached in the case of *The Newry and Enniskillen Ry. Co.* v. *Edmunds* (2); but those cases are not, I think, direct authorities on the point at issue. The next case is *Johnson* v. *Lyttle's Iron Agency* (5). In that case the company was governed by Table A of the Companies Act 1862, and it appears to me that Art. 4 is substantially in the same terms as Art. 18 in the present case. In that case the directors resolved that a call be made of £2 per share, and that the shareholders be requested to pay the same as soon as possible. The secretary in an affidavit stated that the time of payment of the call was discussed by the directors, and that he received verbal instructions from them to send out the necessary notice informing the shareholders that the call should be payable on or before 16th December 1876. The plaintiff did not pay the call, and he was subsequently served with a notice that unless the call together with interest at the rate of 5 per cent per annum from the date of the call was paid by a special date his shares would be forfeited. In the action the plaintiff moved for an injunction to restrain the company from proceeding with the forfeiture. Sir George Jessel, M. R., refused the motion holding that the call had been validly made. In dealing with the construction of Table A, the Master of the Rolls says (p. 690) :

> " Now, it is quite clear that the Act of Parliament does not require the day for the call to be named in the same resolution as the one by which the call is made. You may make the call, and then you may by subsequent resolution or direction name the day for the payment. Nor does the Act of Parliament require the day to be named by any particular formal act by the directors. No doubt it requires their sanction and authority, but it does not require it to be made by a formal resolution put in that shape, or by resolution entered in the minutes. It is sufficient if they direct it."

The matter then went to the Court of Appeal who allowed the appeal on the ground that the notice for final payment was inaccurate inasmuch as it claimed payment of interest from the date of the call, and they held that the forfeiture founded on the notice was bad. None of the Judges in the Court of Appeal expressed any dissent from the views of the Master of the Rolls as to the constructions of Table A, except that James, L.J. expressed the tentative view that the time for the payment of the call could not properly be fixed by a mere verbal direction to the secretary, and that it ought to be fixed by a formal resolution of the directors. It appears to me that that case is a direct authority for the proposition that under such articles as we have in this case it is not necessary for the resolution making the call to specify the time for payment, and it would seem to follow a fortiori that it is not necessary to specify the person to whom or the place where the call is to be made. I need hardly say that the opinion of Sir George Jessel as to the construction of the Articles of Association is entitled to very great weight. The next case to which I wish to refer is *In re Cawley & Co.* (6), and it was on that case that the learned Judge in this case based his decision. In that case there had been a resolution of the directors making a call which left the date on which it was to be paid in blank. It was held by the Court of appeal that in fact the shareholder concerned had transferred his shares before the call was made, and it was not therefore necessary to consider whether the call was valid or not. But in the Court of appeal the learned Judges did express opinions as to the validity of the call, although they recognized that it was not necessary to do so. The material article in that case was Art. 38 which was in these terms :

> " The amount payable on the shares in the capital shall be payable at the bankers of the company, or at such other place as the Board shall appoint, with such deposit and in such instalments and manner, and at such time, as shall be appointed from time to time by the Board."

It is to be observed that it is in quite a different form from Art. 18 in the present case. There is no express power to the directors to make a call ; the article only deals with how the call is to be paid. On the construction of that article the Court of Appeal expressed the view that the resolution making a

3. (1840) 7 M & W 243=2 Ry Cas 401 = 10 L J Ex 17.
4. (1841) 7 M & W 574=11 L J Ex 26.
5. (1877) 5 Ch D 687 = 46 L J Ch 786 = 36 L T 528=25 W R 548.
6. (1889) 42 Ch D 209=58 L J Ch 633 = 61 L T 601=37 W R 692=1 Meg. 251.

call must state the time at which it was to be paid ; in effect they held that all the conditions specified in Art. 38 and necessary to make a call enforceable must be specified in the resolution making the call. The previous cases to which I have referred were not cited in the Court of appeal, no doubt, on the ground that the articles in those cases were worded quite differently from Art. 38 in that case, and the case seems to me to be at the most an authority on the construction of the particular article in that case. It is true that at the conclusion of the judgments Lord Esher, M. R. said this (p. 236):

"I do not wish it to be supposed that my decision in this case rests only on the articles. I take it to be of the very essence of the call that the time and place for payment should be determined."

If the learned Master of the Rolls intended to say that whatever the articles might provide no resolution for a call could be valid, which did not specify the time and place of payment, his opinion seems to me to be directly at variance with the previous decisions quoted, and I respectfully dissent from it. With regard to the two cases in this Court, which the learned Judge discusses in his judgment, the case of *Pioneer Alkali Works* v. *Amiruddin* (7) is distinguishable because the amount of the call was not specified in the resolution, and it may well be that a call cannot be validly made unless the amount is specified. I am not however prepared to agree with all the views expressed by the learned Judge in that case. The judgment seems to me open to the same criticizm as the judgment under appeal, namely, that it attaches to the articles falling for construction as meaning other than they naturally bear in deference to a decision upon articles differently worded. The case of *Bhagirath Spinning & Weaving Co.* v. *Balaji* (8) was also a case in which the amount of the call was not specified and the case does not really assist us, because the report does not show what were the Articles of Association which governed the company and neither of the learned Judges who decided the the case mention the terms of the articles which the Court had to construe.

7. A I R 1926 Bom 341=94 I C 681=50 Bom 461.

8. A I R 1930 Bom 267=125 I C 419=54 Bom 178.

It appears to me that the weight of authority is clearly in favour of the construction which I should myself put upon the articles in this case, and that we should hold that the second and third calls were validly made by the resolutions of 16th December 1921 and 7th November 1922. But then Mr. Setalvad for the company says that that does not dispose of the matter. He says that the share-holder was not liable to pay a call until the person to whom and the place where it was payable were appointed by the directors; and that no doubt is so. He says that these matters never were appointed by the directors, that there was therefore no enforceable call, and that the forfeiture was invalid. The persons to whom, and the place where the call was to be made were specified in the notices of calls given to the appellant, and those notices were signed by the agents "by the order of the Board." The learned Advocate-General for the appellant contends that we must presume that a proper resolution was passed dealing with these matters, and he relies on several cases, particularly *Knight's* case (9). I am disposed to agree with the view of the learned Judge that as we have the minute book of the company in evidence, we cannot presume that there was any formal resolution of the directors going beyond the resolutions entered in the minute book. Nor do I think that the resolution of 7th September 1925, (Ex. J), can be treated as part of the resolution of the directors appointing the persons to whom and the place where the original calls were to be made (as argued by the Advocate-General)—that resolution having been passed under Art. 24, and being based on the view that a call had been validly made. But speaking for myself I do not think that it is necessary to have a formal resolution of the directors specifying the person to whom, and the place where, a call is to be made. These ore minor matters of much less consequence to a shareholder than the fixing of the time for payment, and as I have pointed out, Sir George Jessel M. R. in *Johnson* v. *Lyttle's Iron Agency* (5), held that even the fixing of time need not be the subject of a formal resolution, though James, L. J., differed from this view.

9. (1867) 2 Ch 321=36 L J Ch 317=15 L T 546=15 W R 294.

It is true that these matters must be fixed by the Board because the articles so provide, but I think we must presume that the agents did their duty and took instructions from the Board; otherwise they would not have been justified in signing "By the order of the Board." It is plain from the resolution (Ex. J.) that the directors knew to whom and where the calls were to be paid. I am of opinion that we must presume that these matters were the subject of directions given by the board, though there may have been no formal resolution; and if that is so, there was no irregularity. Stress was laid on the fact that the appellant was himself a director at the time and has not given evidence of any directions given by the directors to the agents. But in my view the burden is upon the company to displace the presumption that the agents acted properly. In any event the absence of evidence can hardly be matter of comment in view of the time which has elapsed since the resolutions in question. Directors or agents cannot be expected to remember exactly what happened eight or nine years ago. I would however hold further that even if it were necessary to have a formal resolution of the Board stating the names of the person to whom, and the place where, the call should be paid, that is a matter which it would be open to the parties to waive : see ex parte *Wollaston* (10). It is in my opinion, clear that the appellant has waived any right he might have had to object to his liability for the calls and to challenge the forfeiture, and the company having enforced the forfeiture for two years have waived any irregularity which it is within their power to waive. In my opinion to hold that a forfeiture solemnly resolved upon and enforced for two years without objection from the shareholder should be set aside as ultra vires by the company on the ground that there had been no formal resolution of the directors directing that the calls be paid to the agents at the registered office of the company (which would be the natural method of payment) would be to take much too narrow a view.

For the above reasons I am of opinion that the shares of the appellant were validly forfeited and that his name ought not to be entered on the register of shareholders, and that the appeal must be allowed with costs, against the company. Two counsel allowed.

10. (1859) 28 L J Ch 721.

Blackwell, J.—I am of the same opinion. Mr. Setalvad's contention that the call was bad because the persons to whom and the place at which it was to be paid were not mentioned in the resolution was mainly based upon the observations of the learned Judges of the Court of Appeal in *In re Cawley & Co.* (6). But in that case the article with which they were dealing was in an entirely different form from Art. 18 in the present case, and the opinions of the learned Judges were obiter. In *Johnson* v. *Lyttle's Iron Agency* (5), in construing Cl. 4 of Table A, which was very similar to the article which we are called upon to interpret, Jessel, M. R., said (p. 690) :

> "You may make the call, and then you may by subsequent resolution or direction name the day for the payment. Nor does the Act of Parliament require the day to be named by any particular formal act by the directors. No doubt it requires their sanction and authority, but it does not require it to be made by a formal resolution put in that shape, or by resolution entered in the minutes. It is sufficient if they direct it. What shall be sufficient evidence of direction is another matter."

In coming to this conclusion he relied upon the authority of *The Newry and Enniskillen Railway Company* v. *Edmunds* (2), where Parke, B., giving the judgment of the Full Court of Exchequer, said (p. 122) :

> "It follows that the resolution to make a call need not specify either the time or place for payment ; but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing him 21 days for the purpose of payment. The case of *The Great North of England Railway Company* v. *Biddulph* (3) proves, that the resolution need not contain the place of payment; and I think that by implication it also proves, that it need not contain the time of payment."

The judgment of Jessel M. R. was reversed in the Court of Appeal, but on another point ; and although James, L. J. said that as at present advised he thought that the time for payment of the call could not properly be fixed by a mere verbal direction to the secretary, and that it ought to be fixed by a formal resolution of the directors. Mellish, L. J., and Baggallay, J. A., did not express any dissent from the opinion of Jessel, M. R., on this point.

Mr. Setalvad also relied upon two decisions of this High Court, namely, *Pioneer Alkali Works* v. *Amiruddin* (7) and

Bhagirath Spining & Weaving Co. v. *Balaji* (8). In the first case the facts were in some respects different from those in the present case, but inasmuch as the learned Judge appears to have regarded the opinion of Jessel, M. R. in *Johnson* v. *Lyttle*'s *Iron Agency* (5) as having been overruled by the Court of appeal, although his judgment was in fact reversed upon another point, and also based certain of his observations upon the obiter dicta of Esher, M. R. in *In re Cawley & Co.* (6), I am, with respect, not able to agree with those observations. In the second case the relevant articles are not set out; that case therefore appears to me to be of no assistance in the present case.

Construing Art. 18 in the light of the opinion of Jessel, M. R. in *Johnson* v. *Lyttle's Iron Agency* (5), I am of opinion that it is not necessary that the persons to whom, and the place at which, the call is to be paid, should be mentioned in the resolution making the call, and that the article is complied with if the directors appoint the persons and the place, even though informally, before the notice of the call is sent out.

Mr. Setalvad has however contended that even if this be the true construction of Art. 18, there is no evidence that the directors did in fact appoint the persons and the place. So far as positive evidence is concerned, this is no doubt true. But the question then arises as to whether in the absence of evidence the Court ought not to presume that the directors appointed the persons and the place before the notice of the call was sent to the appellant. In *Johnson* v. *Lyttle's Iron Agency* (5) Jessel, M. R. summarized the opinion of Parke, B. in the *Great North of England Railway Company* v. *Biddulph* (3) a case on the question whether it was necessary that the place should be specified in the resolution for the call as follows (p. 691) :

"He comes to the conclusion that it is not necessary that it should be named at the time of making the call, and therefore he says, where you have no proof at all, that is, where there is an absence of proof but you find an act done which ought to be done by the authority of the directors, you must assume it to have been done by their authority . . . ."

Then dealing with the facts of the case before him, Jessel, M. R. went on to say (p. 691) :

"I take it as a general principle, when we find, for instance, the secretary writing letters on behalf of the company, we assume in the absence of evidence that he is authorized by the company to write them. Therefore if there had been no evidence at all either way in this case I should be bound to assume, both on principle and authority, that this letter was written with the sanction of the directors."

Now in the present case the notices of the second and third calls, Exs. E and J., which specify the persons to whom, and the place at which, they were to be paid, and which were sent to the appellant, were signed by the agents of the company, and each of them bears upon the face of it the words "by the order of the Board," and I think that in the absence of any evidence upon the point the Court is entitled to assume that these notices were sent out by the agents of the company with the sanction of the directors, and that the directors had in fact appointed the persons and the place, and that is the assumption which I make.

In my opinion therefore the requirements of the articles in this case had been complied with and the appellant's shares were duly forfeited. It follows that the company were not entitled to rescind the forfeiture without the consent of the appellant see : *Larkworthy's* case (1), and his name ought not to have been placed upon the list of contributories. Accordingly I agree that this appeal should be allowed with costs.

K.S. *Appeal allowed.*

A. I. R. 1933 Bombay 85

BEAUMONT, C. J. AND BLACKWELL, J.

Jivanlal Narsi—Appellant.

v.

Pirojshaw R. Vakharia & Co. — Respondents.

Original Civil Jurisdiction Appeal No. 53 of 1931, Decided on 26th September 1932, from Suit No. 134 of 1931.

Letters Patent (Bombay), Cl. 15—Order of Judge under S. 17, Civil P. C., is "judgment" and is appealable—Civil P. C. (1908), S. 10.

The decision of a Judge under S. 10, Civil P. C., is a "judgment within Cl. 15, Letters Patent, and not a mere order relating to procedure in the suit and therefore it is appealable for where the question is whether the Court has jurisdiction to entertain a suit, that must involve a determination of a right of a party, who might be adversely affected, if the Court determined that it has jurisdiction : 13 *Beng L R* 91; 2 *I C* 157; 3 *M H Cr* 384 and *A I R* 1930 *Cal* 685, *Appr.* [P 87 C 1]

M. V. Desai and *K. M. Vakeel*—for Appellant.

Jamshed Kanga—for Respondents.

Facts.—The plaintiffs were commission agents doing business in Bombay. The defendant carried on business at Adoni. The defendant sent cotton bales from Adoni to plaintiffs in Bombay. A suit was filed by the defendant on 23rd December 1930, against the plaintiffs in the Court of the District Munsif at Bellary (Madras Presidency) to recover the amount due on the above transactions. In that suit the plaintiffs filed their written statement on 8th June 1931. On 29th January 1931 the plaintiffs sued in the Bombay High Court to recover Rs. 1,923-9-9 alleged to be due from the defendant at the foot of the commission agency account. The defendant filed his written statement on 20th June 1931, wherein he stated inter alia: "The defendant submits that the present suit is barred by reason of the pendency of the suit at Bellary which has been instituted prior to the filing of the present suit." Issues on this plea were formed and heard first by Wadia, J., on 28th August 1931, when his Lordship refused to stay the suit and ordered it to be placed on board for disposal as a part-heard suit. The suit was tried on merits, and on 7th October 1931 his Lordship passed a decree in favour of plaintiffs for Rs. 1,816-6-3. The defendant appealed. At the hearing, the plaintiffs' a preliminary objection was taken that no appeal lay against a refusal to stay a suit.

Blackwell, J.—(After stating the facts, his Lordship proceeded): The Advocate-General took the point that no appeal lay against a refusal to stay a suit. He submitted that an order refusing to stay was not a "judgment" within the meaning of Cl. 15, Letters Patent. He referred to a decision of this High Court, *Ibrahimbhai* v. *Yoosuf* (1). In that case an order had been passed by a Judge on the Original Side of the High Court fixing a date for the sale of partnership property. It was held that neither that order nor a subsequent order varying the date of the sale was a "judgment" within the meaning of Cl. 15, and no appeal lay. In the course of his judgment the learned Chief Justice said this (p. 14):

"A preliminary point has been taken by the respondents on this appeal that no appeal from the order lies under Cl. 15, Letters Patent. That question involves consideration of the meaning of the word "judgment" in Cl. 15, Letters Patent —a question which has frequently come before the Courts in the past. The case which is always referred to on this point in this Court is the case of *Miya Mahomed* v *Zorabi* (2), where it was laid down, adopting the views which had been accepted by the Calcutta High Court, that "judgment" in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability, but that if the order or judgment in question merely regulates procedure of the suit then it is not a judgment within Cl. 15."

The Advocate-General contended that an order refusing to stay a suit is an order, which merely regulates procedure, and that no right of a party is thereby affected. On the other hand, Mr. M. V. Desai, who appeared for the appellant, has referred to a decision of the High Court of Bengal in *Hadjee Ismail Hadjee Hubbeb* v. *Hadjee Mahomed Hadjee Joosub* (3). There an order had been made granting leave to the plaintiff to institute a suit under Cl. 12, Letters Patent. At p. 101 Couch, C. J., said as follows:

"It was held by the High Court at Madras in *De Souza* v. *Coles* (4), that an order made under this clause of the Charter was subject to appeal. We may not agree in all the reasons which the learned Judges of that Court gave for their decision, but we do agree in the conclusion that this is an appealable order. It is of great importance to the parties. It is not a mere formal order, or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have."

And it was held that an order granting leave to institute a suit under Cl. 12 was an appealable order. Mr. Desai also referred to the case of *Joylall & Co.* v. *Gopiram Bhotica* (5). In that case it was held that the decision of the Court that the applicant was not in the circumstances of the case competent to avail himself of the benefit of the stay section of the Arbitration Act by reason of steps taken by him in the proceedings in the suit determined that the controversy between the parties must be decided by that Court and not by arbitration and was a judgment within the meaning of the Letters Patent and as such was appealable under Cl. 15. Mookerjee, J. in the course of his judgment referred to a decision in *Hadjee Ismail Hadjee Hubbebb* v. *Hadjee Mahomed Hadjee Joosub* (3) and expressed the opinion that the principle of that case

1. A I R 1932 Bom 134=137 I C 456=56 Bom 237.
2. (1909) 2 I C 157.
3. (1874) 13 Beng L R 91=21 W R 303.
4. (1868) 3 M H Cr 384.
5. A I R 1920 Cal 685=58 I C 755=47 Cal 611.

applied to the question then before the Court. He observed that Greaves, J., had held by his order that the applicant was not, in the circumstances of that case, competent to avail himself of the benefit of that section by reason of steps taken by him in the proceedings in the suit, and went on to point out that that decision virtually determined that the controversy between the parties must be decided by that Court and not by arbitration, and he took the view that such a decision was a "judgment" within the meaning of the Letters Patent. Relying on those decisions, Mr. Desai has argued that by Wadia, J's. decision the appellant has been deprived of his right to have the suit in this Court stayed in order that the matter in issue may be litigated in the Bellary Court. He has argued that the refusal to stay has conferred jurisdiction upon this High Court to try this case, and that that has involved an obligation upon the defendant—unless he is willing to allow the case to go by default—to come to this High Court, submit to its jurisdiction, and contest the case. In my opinion, where the question is whether a Court has jurisdiction or has no jurisdiction to entertain a suit, that must involve the determination of a right of a party, who might be adversely affected, if the Court determined that it has jurisdiction. Accordingly, in my opinion, the preliminary point taken by the Advocate-General fails.

Beaumont, C. J.—I agree with the judgment of my learned brother, and with the reasons on which it is based; and I only desire to add a very few words as to the issue under S. 10, Civil P. C. It appears to me that a decision of the Judge either to allow or to refuse a stay under that section is a decision, which in fact goes to the jurisdiction of the Court. If the case is brought within S. 10, then the Court has no jurisdiction to proceed with the trial of this suit, so long as the earlier suit is pending; and when the earlier suit is determined, the matter in issue in this suit will probably be res judicata. Therefore the decision of the Judge under S. 10 really determines the right of the plaintiffs to sue in this Court; and it seems to me that such a decision is a "judgment" within Cl. 15, Letters Patent, and the authorities under that clause, and that such a decision is not a mere order relating to procedure in the suit. (After dealing with the appeal on its merits, the decree was confirmed by their Lordships).

K.S./R.K. *Appeal dismissed.*

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* A. I. R. 1933 Bombay 87

BEAUMONT, C. J. AND BLACKWELL, J.

Abdul Satar and *others*—Appellants.

v.

Advocate-General of Bombay—Respondent.

Original Civil Jurisdiction Appeal No. 16 of 1932, Decided on 22nd September 1932.

(a) Practice — A person cannot be both plaintiff and defendant at once.

A person cannot be on both sides of the record at once; his name must be struck out from one side. [P 88 C 1]

(b) Deed—Rule of construction.

The general rule of construction of deeds is that the Court must ascertain the intention of the parties from the language they have used, giving to that language its fair and natural meaning and construing the document as a whole. Having ascertained the intention of the parties in that manner, the Court must apply the law to the intention so ascertained. If the arrangement which the parties intended infringes wholly or in part some provision of law, then the rights of the parties must be adjusted on that basis. If the words of the deed are ambiguous, the Court may lean to a construction which produces a legal arrangement rather than one which is illegal on the principle that it is better to effectuate than to destroy an intention which, one may naturally presume, was not intended to transgress the law. The Court is never justified in giving to the language used by the parties a meaning other than that which it naturally bears in order to save the intention from being rendered invalid. If the Court does that, it is really making an arrangement for the parties which they have not made for themselves: *Pearks* v. *Moseley*, (1880) 5 *A C* 714, *Foll.*; 8 *Bom L R* 245, *Diss. from.* [P 88 C 2]

*** (c) Mahomedan Law — Wakf—Power of revocation in favour of settlor makes wakf invalid.**

The reservation of a power of revocation in a deed of wakf is inconsistent with the fundamental idea underlying a wakf, that fundamental idea being that the property is treated as vested, not in trustees, but in Almighty God, and therefore a power of revocation in favour of the settlor contained in a deed of wakf renders the deed void and it is immaterial that where there are two settlors the power of revocation is only in favour of one of them when both concur in giving such power: *Case law* and *textbooks discussed.* [P 90 C 1, 2]

V. F. Taraporewala and *R. J. Kolah*—for Appellants.

M. L. Manekshah and *Jamshad Kanga*—for Respondent.

Beaumont, C. J.—This is an appeal from a decision of Kania, J., given upon an originating summons, which raises the question, whether a deed of wakf dated 9th March 1923, is void according to Mahomedan law.

The original plaintiff was one Abdul Satar Suleman Haji Ahmed, and the defendants were the Advocate-General of Bombay, representing charity, and the trustees of the deed of wakf. Before the summons was heard, it appeared that the original plaintiff had really no interest in the property, and that the person primarily interested in maintaining that the deed of wakf was void was defendant 2. Accordingly defendant 2 was made a plaintiff. But his name was left on the record as a defendant also. That is wrong, and his name must be struck out, as a person cannot be on both sides of the record at once. Defendants 3 and 4 are the other trustees of the deed.

The deed of wakf, which is Ex. A, is dated 9th March 1923, and is made between Haji Ahmed Oomer and plaintiff 2 of the one part and the same two persons and a third as the trustees of the other part. It recites that the settlors are entitled to certain immovable property, and that they are desirous of settling the same by way of wakf in manner thereinafter appearing. Then there is an assignment to the trustees, and a direction is, given to the trustees to set apart 40 per cent. of the income of the trust property, and to pay out of that 40 per cent, Government and Municipal taxes, ground-rent, and other rates and outgoings, and the balance of the 40 per cent. is to be used for constituting a sinking-fund for the purpose of doing heavy repairs or reconstruction of the trust premises. Then Cl. 5 directs that the trustees are to stand possessed of the remaining 60 per cent. of the gross rents and income of the trust premises upon the trust there set out, those trusts being in effect for Mahomedan charities, and the last paragraph of that clause provides that

"the trustees shall have full discretion to apply the said 60 per cent. of the gross rents and income to any of the above-mentioned objects in such order either one after the other or to one or more of them simultaneoulsy as the said trustees may in their absolute discretion think proper."

Then Cl. 12 is in these terms :

"Provided always and it is hereby lastly agreed and declared that it shall be lawful for the said settlor Haji Ahmed Oomer at any time or times hereafter during his lifetime by any deed or deeds revocable or irrevocable or by his last will or any codicil thereto expressly referring to this power wholly or partially to alter or vary the trust powers and provisions herein declared and contained concerning the trust premises hereby settled or the moneys or properties for the time being representing the same or any of them or any part thereof and by the same or any other deed or deeds or will or codicil to appoint and declare any new or other trusts or powers of and concerning the trust premises or any part or parts thereof as he may think fit."

In the Court below it was apparently conceded that if Cl. 12 of the deed amounted to a general power of revocation, it would invalidate the whole wakf. The learned Judge however held that Cl. 12 on its true construction was limited to altering the trusts declared by the deed and declaring new trusts only in favour of other charitable objects, and that it was not a general power of revocation. It appears to me impossible to support the learned Judge's judgment on that point. The general rule of construction, in cases of this sort is that the Court must ascertain the intention of the parties from the language they have used, giving to that language its fair and natural meaning, and construing the document as a whole. Having ascertained the intention of the parties in that manner, the Court must apply the law to the intention so ascertained. If the arrangement which the parties intended infringes wholly or in part some provision of law then the rights of the parties must be adjusted on that basis. If the words of the deed are ambiguous the Court may, I think, lean to a construction which produces a legal arrangement rather than one which is illegal, on the principle that it is better to effectuate than to destroy an intention, which, one may naturally presume, was not intended to transgress the law : see the judgment of Lord Selbourne, L. C. in *Pearks* v. *Moseley* (1). But the Court, in my opinion, is never justified in giving to the language used by the parties a meaning other than that which it naturally bears in order to save the intention from being rendered invalid. If the Court does that, it is really making

1. (1880) 5 A C 714=50 L J Ch 57=43 L T 449=29 W R 1.

an arrangement for the parties which they have not made for themselves.

Now, in this case it appears to me that the language of Cl. 12 is perfectly plain. It is an ordinary power of revocation, taken, I should say, from some book of English precedents. It enables one of the settlors by deed wholly to alter the trust dsclared by the deed, and by the same deed or any other deed or by will or codicil to declare new trusts concerning the trust premises. From the language of this clause by itself I can see no justification whatever for saying that the new trusts must be trusts of a charitable character. Nor can I see anything in the rest of the deed to justify such a limited construction of Cl. 12. On the contrary, Cl. 5 shows that where the parties intended to give the trustees a discretion in the application of the property to charity, they knew how to express their intention.

Kania, J., based his judgment to a large extent on the decision of Chandavarkar, J., in the case of *Assobai* v. *Noorbai* (2). In that case that learned Judge had to deal with a deed by way of wakf which contained a general power of revocation in terms quite as wide as the power in the present case; and the learned Judge did in that case construe the power of revocation as being confined only to an alteration of the trusts in favour of other charitable objects. In so doing I think the learned Judge was wrong, and that he offended against well-settled canons of construction. In my opinion his judgment cannot be considered as an authority as to the proper method of construing a clause such as we have to deal with in this case.

We have therefore to consider what is the effect of a deed of wakf containing a general power of revocation in favour of the settlor. The fact that the power in this case is in favour of one settlor is, in my opinion, immaterial, since both the settlors concurred in giving that power. As I have said, in the Court below it seems not to have been disputed that such a clause would render the wakf invalid. But in this Court Mr. Manekshah, on behalf of the Advocate-General, has contested that proposition, and has very properly drawn our attention to the fact that there is no authority in support of the proposition which is binding

2. (1905) 8 Bom L R 215.

upon this Court. There are however views of the text-writers and authorities which must be considered.

Dealing with the modern text-writers, Sir Dinshah Mulla in Edn. 9 of his work on Mahomedan Law, at p. 136, states the proposition very clearly. He says:

> "Where at the time of creating a non-testamentary wakf, the wakif reserves to himself the power of revoking the wakf, the wakf is invalid."

He cites certain authorities, the relevant ones of which I will refer to in a moment. Mr. Faiz B. Tyabji in 2nd Edn., of his work on Mahomedan Law, at p. 558, seems to treat the question as somewhat doubtful. He queries whether a right of revocation or alteration may be validly reserved in a wakf, and then he discusses the question and the authorities on the point. On the other hand, Mr. Ameer Ali, in Vol. 1 of his book on Mahomedan Law, 4th Edn., at p. 433, after discussing the various views of the old text-writers, comes to the conclusion that the right view in such a case is that the wakf is valid but the condition, that is, the power of revocation alone, is void. But he cites no authority in support of that proposition. With regard to the older writers, in Hamilton's book on the Hedaya, 2nd Edn., at p. 238, the learned author discusses a difference of opinion on this point between Aboo Yoosaf and Mahommed, and finally expresses, as I understand him, his own opinion in these words:

> "An appropriation moreover is not complete without the will of the appropriator; and as, where he makes a reserve of option, this cannot be ascertained, it follows that the appropriation is void; and being once void its validity cannot afterwards be restored by the condition ceasing to operate."

I gather therefore that his view is that any condition in favour of the settlor would make the whole wakf invalid. The opinion of Baillie, at p. 565, is to the same effect. With regard to the cases there is a dictum of West, J., in the case of *Fatmabibi* v. *The Advocate-General of Bombay* (3), the passage in question being at p. 51. He says:

> "A wakf must be certain as to the property appropriated, unconditional, and not subject to an option."

The expression "option" I think, is clearly wide enough to cover an option of a settlor to revoke the deed. That

3. (1881) 6 Bom 42.

dictum is adopted with approval by a majority of the Full Bench in the Madras High Court in the case of *Pathukutti* v. *Avathalakutti* (4). Then there is the decision of Chandavarkar, J., in *Assoobai* v. *Noorbai* (2), to which I have already referred on the question of construction. In that case the learned Judge deals with this precise point. He refers to the case of *Fatmabibi* v. *The Advocate-General of Bombay* (3) at p. 51, and to the case of *Pathukutti* v. *Avathalakutti* (4) which I have mentioned. Then he refers to Baillie and to Hamilton's Hedaya, and then he sums up his conclusion in these words (p. 250):

"The principle in substance is that the appropriation and dedication in favour of charity must be at the time such appropriation or dedication is made so complete that it should not be in the power of the donor or settlor to recall ever afterwards. It should be such that no proprietary interest is reserved by the settlor and that the property is effectually and once for all dedicated to charity and constituted charity property leaving no power to the settlor to recall the trust and regain the ownership."

That is the only authority which seems to me to be directly in point, and it is of course not binding upon this Court. But, in my opinion, the principle enunciated by Chandavarkar, J., is in accordance with such authorities as there are, on this point, and correctly state the law. Dealing with the matter apart from authority, it seems to me that the reservation of a power of revocation in a deed of wakf is inconsistent with the fundamental idea underlying a wakf, that fundamental idea, as explained by the Privy Council in the case of *Abdur Rahim* v. *Narayan Das Aurora* (5), being that the property is treated as vested, not in trustees, but in Almighty God. It is impossible to contemplate property transferred to Almighty God subject to a condition enforceable in the temporal Courts for recovering that property for the benefit of the settlor. In my view therefore the power of revocation cannot operate and where you have a gift of property to charity made expressly subject to a condition in favour of the donor which condition cannot be given effect to, it seems to me to be more in accordance with the principles of equity and good conscience that the whole gift should be treated as void, rather than that the gift should be supported and the condition ignored. I think therefore that both on authority and on principle we ought to hold that a power of revocation in favour of the settlor contained in a deed of wakf renders the deed void. That being so we must answer the question put to us by declaring that the deed of wakf dated 9th March 1922 being Ex. A is void. The parties will have liberty to apply as to any difficulty which may arise in the distribution of the property. Costs of all parties of the appeal as between attorney and client to come out of the trust property. Two counsel on both sides are allowed.

Blackwell, J.—I am of the same opinion. Kania, J., held that Cl. 12 of the deed was not a general power of revocation, but was merely a power to alter the trusts by substituting new trusts of a charitable nature, such as the trusts enumerated in Cl. 5 of the deed, upon the authority of the decision of Chandavarkar, J., in *Assoobai* v. *Noorbai* (2). In that case the learned Judge had to construe a clause of a deed which is very similar to Cl. 12 of the deed which is before us. The words in question there were (p. 246):

"And it is also hereby declared that I, the said Emnabai, shall be entitled at any time during my life by any deed or deeds to revokeall or any of the trusts, powers and provisions declared and contained by and in these presents concerning the said trusts premises and the accumulation or any part thereof, and by the same or any other deed or deeds to appoint and declare any new and other trusts, powers and provisions concerning the premises to which such revocation shall extend."

Chandavarkar, J., conceded that those words standing by themselves were wide enough to include any secular or charitable trusts; but he went on to express the opinion that (p. 251)

"coming, as the words do, after the charitable trusts specified, they must be interpreted, in my opinion, on the principle of ejusdem generis, to mean trusts for charity."

With great respect to that learned Judge, I think that he took a wrong view of that clause. The words therein were perfectly general, and were plain, and unambiguous. In my opinion he was not justified in interpreting them as limited to a power to alter the trusts by substituting therefor trusts ejusdem generis with the other trusts mentioned in the deed. Similarly, in the case before us, I think that, on the true construc-

4. (1889) 13 Mad. 66.
5. A I R 1923 P C 44=71 I C 646=50 I A 84=50 Cal 329 (P C).

tion of Cl. 12 of the deed, it is a general power of revocation. Upon the second point I respectfully agree with the opinion expressed by the learned Chief Justice that the general power of revocation does affect the validity of the deed, and I do not desire to add anything to his observations. In my opinion the question put to us must be answered in the manner indicated by the learned Chief Justice.

K.S. *Appeal allowed.*

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* A. I. R. 1933 Bombay 91

BEAUMONT, C. J. AND BLACKWELL, J.

Currimbhai Abdulhusain—Plaintiff—Appellant.

v.

Ahmedali Lukmanji — Defendant — Respondent.

Original Civil Appeal No. 7 of 1932, Decided on 13th September 1932, from Suit No. 1424 of 1931.

* **(a) Limitation Act (1908), S. 19, Expl. 2 —Official Assignee is not "agent" of the insolvent and cannot acknowledge debt on behalf of insolvent.**

The Official Assignee is not an agent of the insolvent within the meaning of Expl. 2, S. 19, and hence an acknowledgment by the Official Assignee is not an acknowledgment made by an agent duly authorized on behalf of the insolvent, which would take the case out of the Limitation Act : *A I R* 1921 *Mad* 704, *Dist.* [P 92 C 2]

(b) Interpretation of Statutes.

A Court can only deal with an Act as it stands, and it is for the legislature to amend or to remedy existing defects. [P 92 C 2]

(c) Presidency Towns Insolvency Act (1909) —Amendment.

Provisions like Provincial Insolvency Act, S. 78, sub-S. (2), should be added to the Presidency Towns Insolvency Act. [P 92 C 2]

V. F. Taraporewala and *M. V. Desai* —for Appellant.

Jamshed Kanga, Khergamwala and *K. S. Shavaksha*—for Respondent.

Facts.—A suit was filed for Rupees 75,607-15-11 with interest, on the allegations that the defendant who was his uncle took charge of the plaintiff's properties and managed the same and received rents, profits and income thereof for the plaintiff's benefit from 1918 to 1925; that the defendant from time to time furnished statements of account, the last of which showed a sum of Rs. 60,578-6-9 held by the defendant on plaintiff's account and for his benefit as on 17th June 1925. In 1926, the defendant was adjudged insolvent and the plaintiff proved his claim. A small sum was paid in respect of it by the Official Assignee. The plaint further alleged that the defendant was a trustee for the plaintiff in respect of the moneys and that there was no limitation of time for the accounts and recovery of the moneys; and that in any event by reason of the plaintiff's minority and the acknowledgment alleged to have been given by the Official Assignee and part payment the claim was not barred by limitation. Bar of limitation was pleaded by the defendant. He pleaded an agreement which showed that Rs. 40,000 belonging to the plaintiff was retained by the defendant in the business which he got from his father. Wadia, J., upheld the plea of limitation and dismissed the suit.

Beaumont, C. J. — (His Lordship proceeded after stating the facts.) The next point which the learned Judge dealt with was the question whether an acknowledgment of the plaintiff's claim made by the Official Assignee in the insolvency of the defendant could take the case out of the Limitation Act. That depends on S. 19 of the Act which provides that where before the expiration of the period prescribed for a suit in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Now, it is clear that the Official Assignee is not a party against whom any right or property is claimed; the claim is against the defendant, and the only claim which could have been made against the Official Assignee was for a right to prove the debt of the plaintiff and to receive a dividend. So that clearly the acknowledgment by the Official Assignee does not come within the body of S. 19. But then Expl. 2 says that for the purposes of the section "signed" means signed either personally or by an agent duly authorized in this behalf. It has been argued that the Official Assignee was an agent duly authorized on behalf of the defendant, that is, the insolvent, to acknowledge this debt. It seems to me quite impossible to say that the Official Assignee was an agent of the insolvent or that he had any authority to sign the acknowledgment. Mr. Desai

contends that inasmuch as the Official Assignee was the person in whom the property was vested it must be inferred that he had authority to sign an acknowledgment on behalf of the debtor, and reliance was placed on the observation of Coutts-Trotter, J., as he then was, in *Govindaswami Pillai* v. *Dasai Goundan* (1). That was a case in which money had been paid into Court under the Land Acquisition Act, and the Judge paid certain moneys out on behalf of the owner to a decree-holder, and it was held that the Judge must be treated as the agent of the owner of the moneys so as to make the payment a part payment within S. 20, Lim. Act.

That is clearly a different case. One difference is that nobody else could have made a part payment out of these moneys except the Judge, whereas in this case it would have been possible for the insolvent himself to have made an acknowledgment. I think that case is not really an authority which assists us. Mr. Desai has contended that unless the Official Assignee has authority to acknowledge a debt, creditors may suffer a very serious hardship when an insolvency is annulled. The insolvency may have gone on possibly for some years, and meantime the creditors may not have filed a suit, for which they would have to get the leave of the Court, and may not have troubled to get any acknowledgment, relying on the hope that they would be paid in the insolvency, and when the insolvency is annulled they may find their debts statute barred. Undoubtedly that risk does exist, and I think that it is something in the nature of a trap which the insolvency Judge in annulling an insolvency ought to bear in mind. The point has been dealt with by the legislature in the case of provincial insolvencies, because it is provided in S. 78, sub-S. (2), Provincial Insolvency Act, that where an order of adjudication has been annulled under the Act in computing the period of limitation prescribed for any suit or application for the execution of a decree which might have been brought or made but for the making of an order of adjudication under the Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded. It is, in my opinion, a matter for the consideration of the legislature whether similar provisions should not be inserted in an amendment of the Presidency Towns Insolvency Act. However we can only deal with the Act as it stands, and it is, in my opinion, quite impossible to say that an acknowledgment by the Official Assignee is an acknowledgment made by an agent duly authorized on behalf of the insolvent, which takes the case out of the Limitation Act. (It is not necessary to report the remaining portion of the judgment).

K.S. *Order accordingly.*

1. A I R 1921 Mad 704=44 Mad 971=68 I C 100.

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* A. I. R 1933 Bombay 92

WADIA, J.

Gorakhram Sadhuram

v.

Pirozsha Maneckji Javeri

Original Civil Jurisdiction Suit No. 1768 of 1929, Decided on 1st July 1932.

(a) Costs — Taxation — Costs as between party and party and as between attorney and client—Difference pointed out.

There is a well recognized difference with regard to the principles upon which costs are taxed as between party and party and as between attorney and client. Generally speaking in taxation as between party and party only those costs are allowed which are strictly necessary for the purposes of the prosecution of the litigation, while in taxation as between attorney and client a party is allowed as many of the charges which he would have been compelled to pay to his own solicitor as being costs of the suit which fair justice to the other party would permit. [P 94 C 1]

* **(b) Costs—Taxation— Costs as between solicitor and client—Duty of solicitor pointed out.**

A solicitor's right to recover costs as against his own client arises out of his professional employment, and it is the solicitor's duty to see that his client does not run up unnecessary costs without proper advice. If therefore he claims items in excess of party and party costs from his own client, the expenses must be such as not unusual or extraordinary, unless the solicitor takes care to protect himself by the express authority of his client which he must obtain after he has clearly explained to the client that the costs in respect of such expenses will probably be disallowed as between party and party. If he does not do so, such costs may be altogether disallowed, unless the solicitor is able to show some valid reasons for incurring the expenses without obtaining the necessary authority. No hard and fast rule can be laid down for determining what expenses may be called unusual or extraordinary. Each case depends on its own facts and upon the rival contention of the parties thereto: *English cases referred.* [P 94 C 2

*** (c) Costs — Taxation— Employment of two sets of counsel — Test as to whether it is unusual or extraordinary indicated.**

The question whether the employment of two sets of counsel is a reasonably necessary and proper expense or is unusual or extraordinary, depends upon the facts of the case and the contentions of the parties and the respective defences. The test is whether there is a reasonable probability of there being a substantial difference in the two defences, and whether therefore the solicitor is reasonably justified in briefing two sets of counsel : *A. G. Spalding* v. *A. W. Gamage Ltd*, (1914) 2 *Ch.* 405, *Ref.*
[P 95 C 2 ; P 96 C 1]

(d) Bombay High Court Rules — R. 546 (a) applies only to taxation as between party and party.

The provisions of R. 546 apply only to taxation as between party and party and not as between attorney and client: *A I R* 1926 *Bom* 18, *Rel on.*
[P 97 C 1]

(e) Costs—Taxation — Decision of Taxing Master though not final is not ordinarily interfered with by Chamber Judge—Practice.

Though the Chamber Judge has the right to interfere with the discretion exercised by the Taxing Master and even though the decision of the Taxing Master is not final on the question of quantum, as a rule the Chamber Judge does not interfere with the discretion exercised, except in extreme cases where there has been gross abuse or a serious mistake, or when the Taxing Master has acted on a wrong principle, or applied an altogether wrong consideration : *A I R* 1926 *Bom* 18, *Ref* ; *Turbull* v. *Janson*, (1878) 26 *W R* (*Eng.*) 815. *In the Estate of Ogilvie, Ogilvie* v. *Massey*, (1910) 103 *L T* 154 and *Slingsby* v. *Attorney-General*, (1918) 119 *L T* 104, *Rel on.*
[P 97 C 1]

(f) Costs—Taxation—Instruction charges—Basis of fixing figure indicated.

The instruction charges are charges which are payable to a solicitor for all his trouble and expense in collecting evidence and in preparing the case for the final hearing, and various factors have to be taken into account in fixing the figure, viz., the nature of the case, the evidence, the correspondence, and all the other trouble that is involved in preparing the case.
[P 97 C 2]

C. K. Daphtary and *M. P. Amin*—for Defendants.

Facts.—A chamber summons taken out by defendants 5 and 6 for an order with a view that their objections, dated 2nd December 1931, to the taxation of the bill of costs of defendants 1 and 2 and defendants 5 and 6 as between attorney and client as per the Taxing Master's certificate of taxation on review dated 27th January 1932, should be allowed and that the certificate should be referred back to the Taxing Master for varying it accordingly. On 9th February 1931, the bill of costs was lodged for the purposes of taxation by Hiralal & Co., solicitors, and the taxation was completed sometime in November 1931. After the objection was filed by defendants 5 and 6 a warrant of review of the taxation was issued. The parties were heard by the Taxing Master and evidence was led at some length, and the Taxing Master delivered his judgment on 27th 1932, a copy of which was annexed to his certificate dated 6th February 1932. The certificate was on Blackwell, J's., board on an application for review of the Taxing Master's taxation on 22nd February 1932, but the learned Judge directed that a regular summons in the matter should be taken out by defendants 5 and 6. Accordingly the present chamber summons was taken out by them on 24th February.

Order. — (His Lordship continued after thus stating the facts). Defendants 5 and 6 took three objections to the taxation of the bill of costs of defendants 1 and 2 and defendants 5 and 6 as between attorney and client. The first objection was that the Taxing Master was wrong in allowing charges for briefs and fees for the hearing and final disposal of the suit to two sets of counsel, one set appearing for defendants 1 and 2, and another appearing for defendants 5 and 6, though all were represented by the same firm of solicitors, Messrs. Hiralal & Co. The second objection related to the amount of refresher payable to Mr. Gharekhan, advocate, who was a junior counsel in the case. At first Mr. Setalvad was briefed with Mr. Varma for defendants 1 and 2, and Mr. Taraporewala with Mr. Gharekhan for defendants 5 and 6 ; but before the hearing commenced a change was effected by asking Mr. Taraporewala and Mr. Varma to appear for defendants 1 and 2 and Mr. Setalvad and Mr. Gharekhan to appear for defendants 5 and 6. In the bill of costs Messrs. Hiralal and Co. have charged 15 G. Ms. as refresher for Mr. Gharekhan. Defendants 5 and 6 allege that Mr. Gharekhan's refresher was fixed at 4 G. Ms. a day from the very commencement of the hearing, and they allege an oral agreement under which this refresher of 4 G. Ms. was further reduced to 2 G. Ms. from and after 27th March 1930, during the course of the hearing. Messrs. Hiralal and Co. denied the agreement. The third objection related to the item of instruction

charges for briefing counsel for the hearing on behalf of defendants 5 and 6.

As I have stated before, defendants 1 and 2 and defendants 5 and 6 appeared at the hearing by separate counsel instructed by the same solicitors, and on taxation as between attorney and client the Taxing Master has allowed the costs of both sets of counsel. One of the English rules of taxation which is to be found in O. 45 of the Supreme Court Rules, R. 27, Regn. 8, runs as follows:

> "Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whetheir such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed."

This rule does not preclude the Chamber Judge from interfering with the decisions of the Taxing Master on the question of the allowance of separate defences and the appearance of separate counsel at the trial, for it has been held that this is really a matter of principle. In *Ager* v. *Blacklock & Co.* (1) Kekewich J., held that it was not purely a question of the Taxing Master's discretion, and his ruling was followed in *A. G. Spalding* v. *A. W. Gamage, Limited* (2), in which the Judges differed from the decision in *Beattie* v. *Lord Ebury* (3), in which the Vice-Chancellor refused to interfere with the discretion of the Taxing Master. With regard to taxation however there is a well-recognized difference with regard to the principles upon which costs are taxed as between party and party and as between attorney and client. Generally speaking in taxation as between party and party only those costs are allowed which are strictly necessary for the purposes of the prosecution of the litigation, while in taxation as between attorney and client a party is allowed as many of the charges which he would have been compelled to pay to his own solicitor as being costs of the suit which fair justice to the other party would permit. This is the principle on which, generally speaking, an opposing party is in certain cases made to pay the costs of the other side as between attorney and client. In the present application for review of taxation the question is one relating to the costs which may or may not be allowed to a solicitor against his own client on taxation as between attorney and client. A solicitor's right to recover costs as against his own client arises out of his professional employment, and it is the solicitor's duty to see that his client does not run up unnecessary costs without proper advice. If therefore he claims items in excess of party and party costs from his own client, the expenses must be such as are not unusual or extraordinary, unless the solicitor takes care to protect himself by the express authority of his client which he must obtain after he has clearly explained to the client that the costs in respect of such expenses will probably be disallowed as between party and party. If he does not do so, such costs may be altogether disallowed, unless the solicitor is able to show some valid reasons for incurring the expenses without obtaing the necessary authority. The same principle is stated in Kemp on Costs, at p. 270.

It is clear however that no hard and fast rule can be laid down for determining what expenses may be called unusual or extraordinary. Each case depends on its own facts and upon the rival contentions of the parties thereto. Counsel referred to *In re Blyth & Fanshawe* (4), in which the Appeal Court disallowed the expenditure regarding shorthand notes of evidence, and Baggallay L. J. laid down the rule at p. 210 as follows:

> "I take to be the general rule of law, and an important rule which is to be observed in almost all cases, that if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party whatever may be the result of the trial."

This rule was followed by the Master of the Rolls in *In re Broad* (5) in disallowing the costs of employing a third counsel at the hearing of an appeal. The rule was also followed by Buckley and

1. (1887) 56 L T 890.
2. (1914) 2 Ch 405=83 L J Ch 855=111 L T 829=31 R P C 421=58 S J 722.
3. (1873) 29 L T 419.
4. (1882) 10 Q B 207=52 L J Q B 186=47 L T 610=31 W R 283.
5. (1885) 15 Q B D 420=54 L J Q B 573=52 L T 888.

Kennedy L. JJ., in *Roney & Co.*, In re (6) in which there was a question of the costs of the shorthand notes of certain arbitration proceedings, but Vaughan-Williams, L. J., strongly dissented. There is an earlier case of *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (7), in which the cost of certain shorthand notes was expressly allowed, because in that case such cost was not considered an unusual and unnecessary expense. It was the trial of a patent action comprising many complicated and scientific details. Moreover, the parties had, with the express sanction of the Judge, agreed that a shorthand writer's notes of the evidence should be taken. It was there held that the rule laid down by Baggallay L. J., in In re *Blyth & Fanshawe* (4), only applied to ordinary cases in which there was no necessity to take shorthand notes. I have merely cited these cases in order to show that even in the matter of such an unusual expense no uniform and hard and fast rule has been laid down by the Courts. Reference was also made to the judgment of the appeal Court in *Bagshaw* v. *Pimm* (8), in which a testator was alleged to have made three different wills on three different dates.

The plaintiffs as executors propounded the third will, defendants propounded the first will, and all the four defendants impeached the execution of the second and the third will. The defences were in almost identical terms, and the Court upheld the first will. The Taxing Master held that the interests of defendants 3 and 4 were sufficiently protected by defendants 1 and 2, and the Chamber Judge upheld his decision, but it was reversed by the appeal Court. Lindley, M. R., went even so far as to say that if the separate representation by counsel was only by way of caution and not in any way oppressive or embarrassing, separate sets of costs for counsel should be allowed. There are also two other cases in which the same principle as to unusual costs is laid down. *In re. Snell, a Solicitor* (9), shows that a solicitor must not incur unusual costs without special instructions from his client. In *In re. J. C. Smith* (10) it was laid down that before a solicitor could charge for unusual costs his client must have been made aware that he could recover none of these costs from the opposite party.

The question therefore for me to consider is whether the employment of two sets of counsel was on the facts and the contentions in this case a reasonably necessary and proper expense, or was unusual or extraordinary. Counsel appearing for the solicitors, Messrs. Hiralal & Co., argued that there is no question of any unusual expense arising in this case, because it is usual for solicitors to brief two counsel in a long cause of this nature, and that defendants 5 and 6 cannot be allowed to say that the costs of their counsel should have been shared by counsel appearing for defendants 1 and 2. This contention however in my opinion does not really clinch the point in dispute. Admittedly there was one suit, and there was a common solicitor instructing the parties. Defendants 1 and 2 appeared by one set of counsel, and defendants 5 and 6 appeared by another, and the contention is that if only one set of counsel had been briefed for all the four, the costs would have been so much less for defendants 1 and 2, and also for defendants 5 and 6. The solicitors however incurred more costs by briefing two separate sets of counsel, and that was an unusual expense, and defendants 5 and 6 are not debarred from putting forward this contention merely because they are not supported in it by defendants 1 and 2. The question however, as I have said before, depends upon the facts of the case and the contentions of the parties and the respective defences. My attention was drawn to the plaint and the written statements of defendants 1 and 2 and defendants 5 and 6 in the case. The pleadings are long and set out the various points in dispute. (After examining the plaint and the written statement of defendants 1 and 5, his Lordship proceeded.) The principle of taxation in such cases is laid down in Bannehr and Porter's Guide to Costs, 12th Edn., p. 867, which runs as follows:

"Defendants appearing by the same solicitor, however numerous or diverse they or their inter-

6. (1914) 2 K B 529 = 83 L J K B 451 = 110 L T 411.
7. (1899) 2 Q B 488 = 68 L J Q B 1027 = 81 L T 254=48 W R 125.
8. (1900) P 148=69 L J P 45=82 L T 175=48 W R 422.
9. (1877) 5 Ch D 815=36 L T 534=25 W R 736.
10. (1844) 2 D & L 876=13 M & W 477=8 Jur 1143.

ests may be, can have but one bill of costs; but this will not limit their representation in Court. If their interests are diverse, separate counsel may appear in Court, and their charges will be allowed."

The point for consideration therefore is whether the interests of defendants 1 and 2 and defendants 5 and 6 were so diverse as to warrant their appearance by separate counsel at the hearing. The fact that counsel were instructed by one and the same firm of solicitors, and the fact that each witness called by the plaintiffs was examined only by one leading counsel on either side and not by the other, are not in themselves conclusive, any more than the sending of special retainers and the filing of separate appearances; for if it was an improper and unusual expense to have briefed two sets of counsel, it would be incidentally also improper to have sent special retainers and filed separate appearances. It was however conceded in argument that one written statement could not have been filed by defendants 1 and 2 and by defendants 5 and 6, even though some of the defences were common. In my opinion it cannot be said that because one counsel could have represented all the four defendants at the hearing, it was not necessary to brief counsel separately, because in that case it would follow that however different the defences may be, provided there was no sharp conflict between them, separate counsel cannot be briefed, or if briefed, separate costs cannot be allowed, as it can be argued that one counsel can always take care of all the defendants and urge all their defences, the interests of the defendants regarding their mere opposition to the plaintiffs being generally identical. This to my mind is not the proper test. The test is whether there is a reasonable probability of there being a substantial difference in the two defences, and whether therefore the solicitor is reasonably justified in briefing two sets of counsel. As was pointed out by Sargeant, J. in *A. G. Spalding* v. *A. W. Gamage, Ltd.* (2), at pp. 409-410:

"It is extremely awkward for counsel when the cases of two sets of defendants are at all different to throw themselves first into the defence of one set of defendants, and afterwards into that of the other set of defendants, although there may not be any material incompatability between them."

In that case costs of separate counsel were allowed. In the case before me it was argued that defendants 1 and 2 were in no way interested in the arbitration proceedings in which defendants 5 and 6 were interested. But counsel for defendants 5 and 6 argued that all were jointly interested in attacking the agreement, and if the agreement was successfully attacked, the arbitration proceedings and the award would have gone by the board. That again to my mind is not the proper test, for according to the observation of Sargeant, J., which I have just referred to, the same extremely awkward and embarrassing position would have arisen in this case, if defendants 1 and 2 and defendants 5 and 6 were represented by the same set of counsel.

There are numerous cases in which parties are not entitled on questions of costs to sever in their defences. In *Bull* v. *West London School Board* (11) separate costs of two surveyors working in partnership and who merely appeared in certain interlocutory proceedings for discovery were not allowed, because it was held that they were not entitled to sever in their defences, though as a matter of fact the partnership had been dissolved before they appeared separately. Each case, as I have said, depends upon its own facts; and considering the facts and contentions of this case, considering that the counterclaims of defendants 1 and 2 and defendants 5 and 6 are based on different causes of action, considering also the fact that defendants 5 and 6 are alone concerned with the award and with prayers (d) and (e) in the plaint, and considering also that there is a charge of fraud against defendants 4 and 5 which had to be specifically answered by defendants 5 and 9, I am of opinion that the sollcitor properly exercised his discretion when he arranged for his clients to appear separately by different sets of counsel. It was not, in my opinion, necessary for him therefore to have, under the principle which I have referred to above, explained to his client that the extra cost of engaging two sets of counsel would be disallowed on taxation between party and party, and to have obtained the client's express authority. Before I conclude this portion of the judgment I may refer to R. 546 (1) of our High Court Rules which provides that:

11. (1876) 34 L T 674.

"No costs are to be allowed on taxation which do not appear to the Taxing Officer to have been necessary or proper for the attainment of justice or defending the rights of the party or which appear to the Taxing Officer to have been incurred through overcaution, negligence or mistake, or merely at the desire of the party."

It was argued that this rule applied to taxation as between attorney and client, and that therefore the solicitors were not justified in incurring an expense which was not necessary or proper for the attainment of justice or for defending the rights of defendants 1 and 2 and defendants 5 and 6. In the first place this rule has been held to apply to taxation as between party and party only: see *Parashuram Shamdasani* v. *Tata Industrial Bank* (12); and looking at the other subdivisions of R. 546 it is clear that its provisions are meant to apply to taxation as between party and party only. I have already dealt with the question as to whether or not the costs of separate sets of counsel was necessary or proper, and if R. 546 (1) was at all applicable, I would say that the employment of two separate sets of counsel was necessary and proper for the attainment of justice and defending the rights of the defendants in this case. (Here his Lordship considered the second point and proceeded.) The third objection refers to the instruction charges allowed by the Taxing Master on behalf of defendants 5 and 6. I may say here that as a rule the Chamber Judge does not interfere with the discretion of the Taxing Master, except in extreme cases where there has been gross abuse or a serious mistake, or when the Taxing Master has acted on a wrong principle, or applied an altogether wrong consideration: see *Turnbull* v. *Janson* (13) and *In the Estate of Ogilvie, Ogilvie* v. *Massey* (14) and *Slingsby* v. *Attorney-General* (15). That this Court has the right to interfere with that discretion is not denied, and it has been laid down in *Parashuram Shamdasani* v. *Tata Industrial Bank* (12), following the English rules of taxation, that the decision of the Taxing Master is not final even on the question of quantum. The instruction charges are charges which are payable to a solicitor for all his trouble and expense in collecting evidence and in preparing the case for the final hearing, and various factors have to be taken into account in fixing the figure. Taking the nature of the case, the evidence, the correspondence, and all the other trouble that was involved in preparing the case into consideration, I cannot say that the discretion exercised by the Taxing Master in allowing Rs. 10,000 for instruction charges on behalf of defendants 5 and 6 was unjustifiably exercised, or that the figure is in any way improper and excessive.

In the result this application for review by the Chamber Judge of the Taxing Master's certificate must be dismissed with costs. Counsel certified.

K.S. *Application dismissed.*

12. A I R 1926 Bom 18 = 91 I C 153 = 50 Bom 69.
13. (1878) 26 W R 815.
14. (1910) 103 L T 154 = 1910 P 243 = 79 L J P 113.
15. (1918) 119 L T 104 = 87 L J P 146 = 1918 P 236.

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* A. I. R. 1933 Bombay 97

PATKAR AND MURPHY, JJ.

Venkatesh Krishna Khasbag — Plaintiff—Appellant.

v.

Bhujaballi Annappa Gargatti and *others*—Defendants—Respondents.

Second Appeal No. 767 of 1929, Decided on 2nd August 1932, from decision of Asstt. Judge, Belgaum, in Appeal No. 75 of 1927.

*** (a) Transfer of Property Act (1882), S. 91—Permanent lease—Mortgage effected by permanent tenant dying without heirs—Landlord is entitled to redeem mortgage.**

Where a permanent tenant effects a mortgage the landlord has an interest in the mortgaged property within the meaning of S. 91, T.P. Act, and is therefore entitled to redeem mortgage when the mortgagor tenant dies without any heirs: 24 *Cal* 440; 36 *Cal* 1003; *A I R* 1919 *P C* 17 and 33 *All* 111 (*F B*), *Ref.*; 1 *Cal* 391, *Dist.*; 30 *All* 488, *held* **Overruled.** [P 99 C 2]

(b) Transfer of Property Act (1882), S. 105—Permanent lease—Presumption.

Where land is given for building purposes and the tenancy is an ancient one, there is a presumption that it is a permanent lease: 7 *Bom L R* 401; 28 *Cal* 738 and *A I R* 1919 *P C* 11, *Rel. on.* [P 98 C 1]

Y. N. Nadkarni and *D. R. Manerikar*—for Appellant.

S. R. Parulekar—for Respondents.

Patkar, J. — This appeal raises the question whether a landlord can redeem a mortgage effected by his permanent tenant who died without leaving any heirs. The point does not appear to have been covered by authority. The land in suit belonged to the plaintiff's grand-

father, Ramji, from whom one Moro took it on a lease in the year 1863. The land was given to Moro for building a house on the site and Moro agreed to pay an annual rent of Rs. 4-8-0. The lease embodied the conditions that so long as the house stood on the site, Moro "his bhaubands or such others as there may be" will continue to pay the rent according to the agreement, and in case the shop or the house were to be sold, it was not to be sold without informing the landlord, and in case a sale was made, a quarter of the proceeds would be payable to the landlord.

In 1875 Moro's widow mortgaged the property in favour of the predecessors of defendants 1 to 3. The tenant died without leaving any heirs, and the present suit was brought by the grandson of the original landlord to redeem the mortgage effected in the year 1875. Both the Courts held that the landlord had no right to redeem. There are no words of inheritance in the lease, Ex. 27. But as the land was given for building purposes and the tenancy is an ancient one, there would be a presumption that it is a permanent lease, according to the decisions in *Navalram* v. *Javerilal* (1), *Caspersz* v. *Kader Nath Sarbadhikari* (2) and *Mt. Afzul-un-Nissa* v. *Abdul Karim* (3). The question is whether the landlord has a right to redeem the mortgage effected by the tenant. Under S. 91, Cls. (a) and (b), T. P. Act :

"Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property : (a) any person (other than the mortgagee of the interest) sought to be redeemed having any interest in, or charge upon, the property ; (b) Any person having any interest in, or charge upon, the right to redeem the property."

According to S. 91 as amended by Act 10 of 1929, Cls. (a) and (b) have been combined in one [clause Cl. (a)] as follows:

"Any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged, or in or upon the right to redeem the same."

It is therefore clear that besides the mortgagor, any person who has any interest in or charge upon the property mortgaged or in or upon the equity of redemption, has a right to redeem. The question is whether the landlord who has effected a permanent lease upon his property has an interest sufficient to fall within the terms of S. 91, T. P. Act. A lease is defined in S. 105, T. P. Act, as a transfer of a right to enjoy the property, made for a certain time, express or implied, or in perpetuity. There is no transfer of ownership as in the case of a sale, which is defined in S. 54 as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. The landlord therefore retains the ownership of the land in respect of which a lease is passed whether for a certain time or in perpetuity. In *Kally Dass Ahiri* v. *Monmohini Dassee* (4), where it was held that a lease, notwithstanding that it is permanent, is liable to forfeiture under the provisions of the Transfer of Property Act if the tenant denies the title of the landlord. It was observed by Sir Lawrence Jenkins as follows (p. 447) :

"The impossibility on which the defendant relies is based upon the assumption that a lessor has no reversion. There seems to me to lurk in this assumption a fallacy based on the theories of English real property law.

A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest. This result is to be inferred by the use of the word "lease," which implies an interest still remaining in the lessor. Before the lease the owner had the right to enjoy the possession of the land, and by the lease he excludes himself during its currency from that right, but the determination of the lease is a removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease."

This view is accepted by their Lordships of the Privy Council in *Abhiram Goswami* v. *Shyama Charan Nandi* (5) and also in *Raghunath Roy* v. *Raja of Jheria* (6). The lower Courts have relied on the decision in the case of *Ranee Sonet Kowar* v. *Himmut Bahadoor* (7) where the question was whether on the failure of heirs of a grantee of an absolute hereditary mukurrari tenure, the zamindar or the Crown takes by escheat, and it was held that where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it. It appears that the

1. (1905) 7 Bom L R 401.
2. (1901) 28 Cal 738=5 C W N 858.
3. A I R 1919 P C 11=50 I C 749=46 I A 131=47 Cal 1 (P C).
4. (1897) 24 Cal 440=1 C W N 321.
5. (1909) 36 Cal 1003=36 I A 148=4 I C 449 (P C).
6. A I R 1919 P C 17=50 I C 849=46 I A 158=47 Cal 95 (P C).
7. (1876) 1 Cal 391=3 I A 92=3 Sar 608 (P C).

mukurrari lease was a transfer of an absolute interest. It could not have been forfeited for non-payment of rent. Further, it was held that there was no ground for holding that the lands could revert, in the proper sense of the term, to the zamindar. This case was followed in *Panchubala Debi* v. *Jatindra Nath* (8).

It was held by a Full Bench of the Allahabad High Court in *Tulshi Ram Sahu* v. *Gur Dayal Singh* (9) that on the death of a fixed-rate tenant without heirs his tenancy does not escheat to the Crown, but reverts to the zamindar who can redeem the mortgage effected by the tenant. The previous case of the same Court in *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (10) was overruled. It was held in *Ram Dihal Rai's* case (10) that in order to redeem, the person seeking redemption must have an interest in "the mortgaged property," and the mortgaged property being the interest of a fixed-rate tenant, the mere fact that the zamindar has a proprietary interest in the land out of which the interest of a fixed tenant is carved does not give him "an interest in the mortgaged property" within the meaning of S. 91, T. P. Act. But it was held by the Full Bench in *Tulshi Ram Sahu's* case (9) by a reference to the Agra Tenancy Act, 1 of 1901, that a fixed rate tenancy was but a limited interest, which cannot be the subject of escheat to the Crown, for the Act provided that on the death of the tenant without heirs the interest of such a tenant shall be extinguished. The previous case of *Ram Dihal Rai* v. *The Maharaja of Vizianagram* (10) was overruled, and the case of *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (7) was distinguished on the ground that a mukararri lease was clearly an absolute interest. It was also an alienable interest and that it could not be resumed or forfeited for the non-payment of rent.

In the case of a permanent lease the landlord is the owner of the land and the interest of the tenant is determined by denial of the landlord's title under S. 111, T. P. Act. There is a distinction made in S. 91, T. P. Act, between a person who is entitled to an interest in the mortgaged property and a person who is entitled to an interest in the equity of redemption, and though the landlord may not be entitled to the interest in the equity of redemption so far as the permanent tenant's right is concerned, it cannot be said that the landlord has no interest in the property mortgaged. The property mortgaged is the house together with the land.

The landlord is the owner of the land and has carved out of his ownership a certain portion, viz., his right of enjoyment which he has transferred to the permanent tenant which could be determined in certain circumstances and the property would revert to the landlord. If the landlord carves out an absolute transferable interest in favour of a permanent tenant which under no circumstances would revert to the landlord it would be difficult to hold that the landlord would have right to redeem the mortgage effected by the tenant; but if on the other hand the interest carved out would revert to the landlord under certain circumstances, e. g., non-payment of rent or denial of landlord's title, the landlord would have sufficient interest to redeem such a mortgage.

The right of a permanent tenant to redeem a mortgage effected by the landlord is recognized by the decisions in the cases of *Raghunandan Prasad* v. *Ambika Singh* (11) and *Paya Matathil Appu* v. *Kovamel Amina* (12) which followed the general principles laid down in *Tarn* v. *Turner* (13). If a permanent tenant is entitled to redeem a mortgage effected by the landlord, it would be on the ground that he is interested in the property mortgaged, as it cannot be said that he is interested in the landlord's interest or in the equity of redemption of the mortgage passed by the landlord. Having regard to the view taken by Sir Lawrence Jenkins in *Kally Dass Ahiri* v. *Monmohini Dassee* (4) and the definition of "lease" in S. 105, T. P. Act, I think the landlord, even in the case of a permanent tenancy, has an interest in the mortgaged property, and would be entitled to redeem under S. 91, T. P. Act.

8. A I R 1926 Cal 993=98 I C 173=53 Cal 816.
9. (1910) 33 All 111=7 I C 231 (F B).
10 (1908) 30 All 488=5 A L J 578=(1908) A W N 210.
11. (1907) 29 All 679=4 A L J 703=(1907) A W N 227.
12. (1885) 19 Mad 151.
13. (1888) 39 Ch D 456=57 L J Ch 1085=59 L T 742=37 W R 276.

There is an additional ground in the present case that the landlord has an interest in also the building erected by the tenant on the land as the tenant agreed to pay a quarter of proceeds in case he sold the property. The landlord has therefore not only an interest in the land but also in the building mortgaged by the tenant. I think therefore that the view taken by both the lower Courts is not correct. The decrees therefore of both the lower Courts will have to be reversed and the case remanded to the Subordinate Judge for a decision on the merits in order to ascertain the amount due on the mortgage and pass a decree for redemption. The costs will be costs in the suit.

Murphy, J.—The suit was filed by a superior holder to redeem a mortgage incurred by his permanent tenant, who has since died, leaving no known heirs against the permanent tenants' mortgagees, who are in possession and who disputed the claim. It has been held that in the circumstances the landlord has no right to redeem and the suit has been dismissed, the dismissal being confirmed by the Court of first appeal. The terms of the permanent lease are set out in the original Court's judgment. No right of re-entry is stated, but a sale had to be reported, and on such an occasion the landlord was entitled to a quarter of the price got for the building. We have been referred to the cases of *Ranee Sonet Kowar* v. *Mirza Himmut Bahadoor* (7) and *Tulsi Ram Sahu* v. *Gur Dayal Singh* (9), which have been distinguished by the Court below, and Mr. Nadkarni's argument has been founded mainly on the definition of "lease" in the Transfer of Property Act. One possible view, of course, is in this connexion, that the subject of the mortgage referred only to the tenancy rights—rights which the landlord having parted with—he could not in consequence be held to be interested in. This is the view taken in *Tulsi Ram Shau* v. *Gur Dayal Singh* (9) by the Judge who first heard the appeal on similar facts.

The correct answer seems to me to depend on the attributes of the permanent lease. If, as in the Privy Council case, the inferior holding has been carved out of and permanently separated from the superior one, so that it can only revert to the superior holder by inheritance or a purchase, he can, I think, have no interest left in it, and cannot redeem the permanent tenants' mortgage. If on the other hand, he can resume in certain contingencies, for failure to pay rent or denial of title, he appears to me to retain some interest in the inferior holding, and in that case can, I judge, redeem. The present case is a case of an ordinary holding of an urban site. It seems to be clear that the superior holder has still an interest in it, for he would be liable to pay any assessment or other tax leviable on it, in case the permanent tenant did not do so, apart from the rights of resumption possible to him in certain contingencies. It seems therefore that the superior holder still has such an interest as would come within S. 91, T. P. Act, and can redeem. I agree therefore with the order proposed by my learned brother, that the decrees of the both Courts below on the preliminary point should be set aside and that the remaining issues arising on the pleadings should be tried and found on.

K.S. *Decree reversed.*

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MURPHY AND NANAVATI, JJ.

Shivappa Dandappa Manvi—Appellant.

v.

Gurpadappa Doddappa Hasibi—Respondent.

First Appeal No. 162 of 1931, Decided on 21st September 1932, from decision of First Class, Sub-Judge, Dharwar.

Civil P. C. (1908), O. 21, R. 2—Decree agreement of adjustment—Full amount under agreement not paid—Balance can be recovered by execution—Civil P. C., S. 47.

Where a decree is adjusted by an agreement to pay a certain sum in satisfaction of the decree amount, and only a portion of the amount under the agreement is paid, the balance can be recovered by execution of the decree to that extent and no separate suit is necessary: 11 *All* 228 and 5 *All* 492 (*F B*), *Appl.* [P 101 C 2]

G. P. Murdeshwar—for Appellant.

R. A. Jahagirdar—for Respondent.

Murphy, J.—This is a first appeal against an order in execution. What happened was that, in the first instance, a decree for Rs. 70,000 odd was made against the judgment-debtor on 1st December 1924. Subsequently, in an application for execution, the parties came to an arrangement or adjustment, by which the judgment-creditor agreed to receive Rs. 50,000 in lieu of Rs. 70,000

decreed him. Of this sum of Rs. 50,000, Rs. 40,000 were to be paid in cash on 1st October 1927, and the balance of Rs. 10,000 was payable in two equal instalments, the first being due on 31st August 1928, and the second on the corresponding date in the following year. It appears that the instalments were not paid, or fully paid, in accordance with the agreement, and the decree-holder consequently brought a second application for execution to recover the balance due under the agreement. The learned First Class Subordinate Judge's view however was that the decree in the suit had been adjusted by the agreement entered into between the parties in Miscellaneous Application No. 1 of 1928.

"So this darkhast on the decree is not maintainable and is therefore rejected with costs. No entry has been made in the suit register about the adjustment. It should be now made."

His view apparently was, and it is supported by Mr. Jahagirdar for the judgment-debtor, that an adjustment such as the one that took place in this case operates as a complete satisfaction of the decree, and consequently, that when its terms are not observed, further proceedings cannot be taken on it in execution, but must be presumably by way of a regular suit. On the other hand, O. 21, R. 2, provides not only for the complete adjustment of a decree, but also for its adjustment in part, the language used being :

"Where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder the decree-holder shall certify, etc."

The real question before us is therefore whether this arrangement has operated as a partial satisfaction of the decree or not ? We think that in fact it has. The original sum due was Rs. 70,000 which the arrangement reduced to Rs. 50,000, and as to Rs. 40,000 of the Rs. 50,000 there was an actual satisfaction, but the terms as to satisfaction of the remaining amount of Rs. 10,000 which was secured by a charge on certain specified property, have not been furnished by the judgment-debtor. Mr. Murdeshwar for the appellant relies on two cases of the Allahabad High Court. The first of these is *Muhammad Sulaiman* v. *Jhukki Lal* (1). Mr. Jahagirdar has tried to distinguish this case on the ground that the corresponding sections there spoken of show that it was a compromise under O. 23, R. 3, and not under O. 21, R. 2. The second case is a Full Bench ruling of the same High Court, *Sita Ram* v. *Dasarath Das* (2), and although it turns somewhat on the then S. 257-A, which is not re-enacted in the present Code, the principle, we think, is not affected, and it was there held that where there has been partial adjustment, the decree can be executed as to the remaining portion in circumstances similar to those in the present case. We therefore reverse the lower Court's order, and remand the darkhast for disposal according to law. Costs costs in the darkhast.

Nanavati, J.—I agree.

K.S. *Order reversed.*

1. (1889) 11 All 228=(1889) A W N 53.

2. (1883) 5 All 492=(1883) A W N 68 (F B).

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PATKAR AND MURPHY, JJ.

Sharanbasappa Tippanna—Plaintiff—Appellant.

v.

Rachappa Basappa Shettar and *others*—Defendant—Respondent.

Second Appeal No. 240 of 1929, Decided on 5th August 1932, from decision of Dist. Judge, Bijapur, in Appeal No. 19 of 1927.

Negotiable Instruments Act (1881), S. 27—Partner passing promissory note in individual capacity — Other members are not liable—Contract Act (1872), S. 251.

Where a partner passes a promissory note not in the name of the firm but in his individual capacity, the other members of the firm are not liable. Therefore in a suit on the promissory note only such partner is liable unless there is an indication in the plaint that the suit is based, in the alternative on the loan advanced to the partnership: *Case law discussed.*

[P 103 C 1, 2]

H. C. Coyajee and *H. B. Gumaste*—for Appellant.

G. R. Madbhavi—for Respondent.

Patkar, J.—In this case the plaintiff sued to recover Rs. 3,714 on a promissory note passed to him by defendant 1 on 23rd January 1925, on the allegation that defendants 1 and 2 lived in union and defendants 3 and 4 were partners of defendant 1, and that the promissory note was passed by defendant 1 as a partner and manager of the partnership shop. The learned Subordinate Judge held that defendant 3 was a partner of defendant 1's firm and that the promissory note was not passed for the partner-

ship business as manager of the firm, and that the debt under the suit promissory note was not binding on defendants 3 and 4. The findings were arrived at on the ground that the suit was based on the promissory note and not based on the debt independently of the promissory note. He therefore held that defendants 3 and 4 were not liable on the promissory note signed by defendant 1, and passed a decree in favour of the plaintiff against defendants 1 and 2. On appeal the learned District Judge, relying on the decision in the case of *Sadasuk Janki Das* v. *Kishan Pershad* (1), held that only the person who appeared on the face of the document as signatory to the promissory note was liable, that defendants 3 and 4 were not liable on the promissory note, and that the suit could not be said to be based on the loan advanced to the partnership. He therefore confirmed the decree of the lower Court.

It is contended on behalf of the appellant that the view taken by both the Courts is erroneous having regard to the decision in the case of *Shanmuganatha Chettiar* v. *Srinivasa Ayyar* (2), following the decision of the Privy Council in *Karmali Abdulla* v. *Karimji Jiwanji* (3) and also the decision in *Raghunathji Tarachand* v. *The Bank of Bombay* (4). In *Shanmuganatha Chettiar* v. *Srinivasa Ayyar* (2) where a promissory note was executed by two out of three partners of a firm for money then advanced to the executants for purposes of the firm and did not contain any indication that it was executed on behalf of the firm, it was held in a suit on the promissory-note that even the third partner who did not execute the note was liable. In that case reliance was placed on the decision of the Privy Council in *Karmali Abdulla* v. *Karimji Jiwanji* (3). Where a promissory note is passed by a partner the other partners would not be liable unless the promissory note is passed in the name of the firm. Under S. 27, Negotiable Instruments Act, every person capable of binding himself or of being bound, as mentioned in S. 26, may so bind himself or be bound by a duly authorized agent acting in his name. It must therefore appear from the promissory note that the agent is acting in the name of the principal. A partner is an agent of the other partners and when he passes a bill of exchange or a promissory note as an agent, he must pass it in the name of the firm in order to make the other partners liable on the bill of exchange or promissory note.

The case of *Karmali Abdulla* v. *Karimji Jiwanji* (3) which was relied upon in the decision in *Shanmuganatha Chettiar's* case (2) was not based on the bills of exchange or hundis. In *Karmali Abdulla's* case (3) the suit was an action for accounts by a person who had accepted the bills of exchange and was for the recovery of the amount paid by the plaintiff to meet the acceptances by him for the accommodation of the drawer or drawers, and the question was decided on the true construction of the agreement between the two partners and the plaintiff. The bills were drawn by the two defendants who had embarked on a joint venture, and when they became due and were payable to the banks, one of the defendants retired the bills of which he was the drawer, but the other defendant who had become insolvent had not retired the bills of which he was the drawer and the plaintiff whose name was on the bills as acceptor had to retire them. The bills of exchange were already paid by the plaintiff and the suit was brought by the plaintiff on account of the payments made by him. Their Lordships of Privy Council were of opinion (p. 274, 39 *Bom.*) that it was erroneous to treat the question as purely a question of liability on the bills, and held that the issue proposed by the trial Judge was right, viz., whether plaintiff paid and advanced moneys on the hundis (bills) for and on account and for the credit of the partnership. The case does not appear to be an authority for the proposition that if a bill of exchange or promissory note is signed by one of the partners individually and not in the name of the firm, the other partners are necessarily bound by the bill of exchange or promissory note. The decision in the case of *Raghunathji Tarachand* v. *The Bank of Bombay* (4), which was brought against the members of a firm on hundis drawn by the manager of the joint family, can be distinguished on the ground that

1. A I R 1918 P C 146=50 I C 216=46 I A 33 =46 Cal 663 (P C).
2. (1917) 40 Mad 727=35 I C 219.
3. A I R 1914 P C 132=26 I C 915=42 I A 48 =39 Bom 261.
4. (1909) 34 Bo[illegible]

the hundis were drawn by the manager in the name of the family firm.

Where a partner of a mercantile firm passes a negotiable instrument in the recognized trading name of the firm, the other partners would be liable on it though their names do not appear on the face of the instrument according to the decisions of the Privy Council in *Bunarsee Dass* v. *Gholam Hossein* (5) and *Moti Lal* v. *Unao Commercial Bank* (6). This rule is based upon the principle embodied in S. 251, Contract Act, that each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose. But under S. 27, Negotiable Instruments Act, the partner so acting must act in the name of the firm in order to bind the firm or all the partners. The question in the present case is whether the other partners are liable when a promissory note or bill of exchange is not passed in the name of the firm, but is executed by one of the partners in his individual capacity. In *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (7) it was observed as follows (p. 92) :

> "We do not think that the general provisions of the Contract Act, 1872, as to the rights and liabilities of undisclosed principals were intended to alter well-established rules as to the negotiable instruments which in our opinion continued to be governed by the law merchant based on general mercantile usage."

In the case of *Vithalrao* v. *Vithalrao* (8), which related to a promissory note signed by one of the members of the joint family as manager in his own name, it was held that though the suit could be maintained in order to recover the debt due under the promissory note against all the members of the joint family, the members of the joint family cannot be held liable in a suit filed on a promissory note signed by one of the members of the family as manager in his own name. In *Sadusuk Janki Das* v. *Kishan Pershad* (1), after reference to Ss. 26, 27 and 28, Negotiable Instruments Act, it was observed as follows (p. 37 of 46 *I. A.*) :

> "It is sufficient to say that these sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory-note against a person whose name properly appears as party to the instrument it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

In that case the suit was dismissed against the Maharaja who was a party to the suit, and the agent was held liable even though he signed the promissory note as :

> "Acting Superintendent of the Private Treasury of His Excellency Sir Maharaja, the Prime Minister of H. H. the Nizam."

It is observed at (p. 35 of 46 *I. A.*) :

> "It would, of course, have been open to the plaintiffs had they thought fit to have framed their case in an alternative form, and to have sued both on the hundis and alternatively upon the consideration."

The same view was taken in *Sitarama Krishna* v. *Chimandas Fatehchand* (9), where Marten, C. J., after referring to *Sadusuk Jankidas'* case (1) where the Judicial Committee held that the Maharaja was not liable, observed as follows (p. 645 of 21 *B. L. R.*) :

> "We quite appreciate that the present is a case of an alleged firm and not of a Maharaja ; but there is no distinction in principle, and it is unnecessary therefore to cite other authorities on the point."

I may in this connexion refer to Halsbury's Laws of England, Vol. 2, para. 835, and Vol. 22, para. 57. It appears clear from these authorities and S. 27, Negotiable Instruments Act, that where a partner passes a promissory note not in the name of the firm, but in his individual capacity, the other members of the firm are not liable. It is contended on behalf of the appellant that even if defendants 3 and 4 are not liable on the promissory note passed by defendant 1 they are liable for the debt due on the promissory note. In *Gordhandas* v. *Raghuvirdasji* (10) it was held that debts contracted by the managing partner of a ginning factory for the purposes of the firm are binding on all the partners in the factory, but the suit was not based on the promissory note passed by the managing partner, but on the various transactions of loans acknowledged by him in the last khata. The question is whether the present suit is based on the promissory note or in the alternative for a debt which formed the consideration

5. (1870) 13 M I A 358=13 W R 29 (P C).
6. A I R 1930 P C 23c=126 I C 428 (P C).
7. (1906) 30 Mad 88=16 M L J 508 (F B).
8. A I R 1923 Bom 244=72 I C 242.
9. A I R 1928 Bom. 516=115 I C 400=52 Bom 640.
10. A I R 1932 Bom 539.

for the promissory note. Both the Courts have taken the view that the suit is based principally and solely on the promissory note and not on the debt which formed the consideration of the promissory note.

In the plaint in para. 2 reference is made to the passing of the promissory note for Rs. 3,000 which were borrowed by defendant 1 for the partnership business and the suit was to recover the said amount, and in para. 6 it is stated that defendant 1 passed the suit promissory note as owner and partner of the shop. There is no clear indication in the plaint that the suit is based in the alternative for the debt which was the consideration of the promissory note. In the counter-written statement, para. 5, reference is however made to the debt, and it is stated that all the defendants are liable for the suit loan as it is for partnership shop. It appears from the fair reading of the plaint that the suit is based on the promissory note and not in the alternative for the loan which formed the consideration for the promissory note, and though in the counter written statement reference is made to the debt, no application was made before the Subordinate Judge for an amendment of the plaint, and after the plaintiff failed in the first Court, it does not appear that any application was made to the District Judge for an amendment of the plaint. We do not think that the plaint is based in the alternative on the debt which formed the consideration of the promissory note. Under the circumstances of this case we do not think that the plaint should be allowed to be amended at this late stage.

It is contended on behalf of the respondent that the amendment should not be allowed at this late stage when the claim on the debt would be time barred, and that the plaintiff could not sue in the alternative for the consideration as it was not for any antecedent or previous debt or goods supplied but for a fresh loan, and that the promissory note was the sole transaction between the parties which gave rise to the cause of action in the present suit. I do not think that it is necessary to go into these points. It is sufficient to say that the plaint on a fair construction of it does not appear to have been based for recovery of the debt in the alternative, and that at this late stage of the case the amendment should not be allowed. I think therefore that the view taken by the lower Courts is right, and this appeal must be dismissed with costs.

Murphy, J.—The question to decide arises on the following facts: Defendant 1, on 23rd January 1925, executed a promissory note for Rs. 3,000, also providing for interest, in the plaintiff's favour. The plaintiff's case was that though defendant 1 was the only party to the promissory note, and it did not on its face purport to create a liability against anyone but himself, the promissory note was really executed on behalf of a firm composed of himself and his brother defendant 2, and defendants 3 and 4, who were also partners of the same firm. The Courts below have both held that since the suit is based exclusively on the promissory note and on its face defendant 1 is alone (with his joint brother) liable, no decree can be passed against the firm, but only against defendants 1 and 2. The Courts have relied on the ruling in *Sadasuk Janki Das* v. *Kishan Pershad* (1). The whole question here is whether when, on the face of a negotiable instrument, it appears that it was drawn in the executant's individual capacity, we can go behind the facts thus stated and ascertain what the real ones were and decide according to them.

The plaintiff's case was that not only was the person executing the promissory note liable, but also his partners. Mr. Coyajee has quoted *Karamali Abdulla* v. *Karimji Jiwanji* (3), but this case seems to me to have no application. The suit there was not brought on the hundis. The hundis in question themselves had been retired, some by the drawer and some by the acceptor, and the latter was suing the partnership for money paid by him on their behalf. The case therefore does not help us. The cases of *Raghunathji Tarachand* v. *The Bank of Bombay* (4), *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (7), *Vithalrao* v. *Vithalrao* (8), *Shanmuganatha Chettiar* v. *Shrinivasa Ayyar* (2), and *Sadusuk Janki Das* v. *Kishan Pershad* (1) have also been cited. Most of these are not strictly apposite. The general rule in fact is clear, and it is that if a suit is brought on a negotiable instrument, that person alone can be recovered from whose name appears on its face, and only in the character in which he so appears. But

where a suit is brought for a sum already due, which has been acknowledged, so to speak, in some form by the execution of a negotiable instrument, which is mentioned, but does not form really the cause of action, evidence may be given to show that others besides the person who executed the instrument are liable. The point appears to me to have been most clearly put by Sir Richard Garth in *Sheikh Akbar* v. *Sheikh Khan* (11), the case referred to and explained in *Parsotam Narain* v. *Taley Singh* (12). There are single Judge rulings of this Court on the point, in *Manchersha* v. *Govind* (13), *Jacob & Co.* v. *Vicumsey* (14), and *Burjorji* v. *Hormusji* (15), and it has been considered by the appellate Court in the case of *Sitaram Krishna* v. *Chimandas Fatehchand* (9), and the trend of the opinion of the Judges of this Court seems to me to be that, where there is a negotiable instrument, prima facie the suit is on it, unless there are circumstances, such as an antecedent debt, and the suit is so framed as to base the cause of action on a fact independent of the negotiable instrument; and that where the suit is on a negotiable instrument alone it can only bind those appearing on the face of the document.

We have considered the language of the plaint and the counter-written-statement, to see if there is a possibility of reading into these documents an alternative claim to the one made on the promissory note. But I think that no such claim can be spelt out of these documents, and that on their faces and prima facie construction, we must hold that this suit was really on the promissory note. Evidently the alternative claim did not occur to the framers of the plaint, as naturally it would not, since here the payment of the loan and the execution of the promissory note were contemporaneous, and the promissory note was not to secure some other liability. In these circumstances I think that we cannot have recourse to the alternative claim, and it does not seem to be a case fit to allow of an amendment of the plaint and re-trial on the point. I agree that the appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

11. (1881) 7 Cal 256=8 C L R 528.
12. (1903) 26 All 178=(1903) A W N 217.
13. (1930) 128 I C 43.
14. A I R 1927 Bom. 437=102 I C 138.
15. A I R 1932 Bom. 394=138 I C 783.

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MURPHY AND NANAVATI, JJ.

Jagmohan Surajmal Marwadi—Applicant.

v.

Venkatesh Gopal Ranade — Opposite Party.

Civil Revn. Appln. No. 425 of 1931, Decided on 5th September 1932 for reversal of order of District Judge, Bijapur, in Misc. Applns. Nos. 25 and 26 of 1931.

Bombay City Municipalities Act (1925), S. 15—District Judge acts under S. 15 as persona designata — No revision lies to High Court from his decision—Civil P. C. (1908), S. 115.

A District Judge acting under S. 15 is not a Court but a persona designata and hence the High Court has no jurisdiction to entertain an application for revision from his order: 21 *Bom* 279 and *A I R* 1926 *Bom* 344, *Rel. on*; *A I R* 1931 *Bom* 582 and *A I R* 1924 *Mad* 561, *Dist.*

[P 106 C 1, 2]

W. B. Pradhan and *Ramnath Shivlal*—for Applicant.

G. R. Madbhavi—for Opposite Party.

Murphy, J.—This is an application made under S. 115, Civil P. C., against the decision of the District Judge of Bijapur, in the matter of an election petition, challenging the validity of the election of a candidate for Ward 2 of the City Municipality of Bijapur. The proceedings were held and a decision made under S. 15, Bombay City Municipalities Act of 1925.

A preliminary objection is taken that no recourse can be had to this Court, since under S. 15, the District Judge was acting not as a Court but as a persona designata and that we have therefore no jurisdiction. If this is so, then, I think, on the authority of the cases of *Balaji Sakharam* v. *Merwanji Nowroji* (1) and *Gangadhar* v. *Hubli Municipality* (2), the application for revision does not lie.

Mr. Pradhan's contention is that the law was changed in consequence of the decisions I have quoted above, and he relies on the case of *Sholapur Municipality* v. *Tuljaram* (3), in which it was held by a Division Bench of this Court, that an application lay under S. 198, sub-Ss. (2), (3), (4) and (5) of the same Act. Those provisions relate to compensation for land acquired, and are in the nature of arbitration proceedings and self-contained. Mr. Pradhan also

1. (1895) 21 Bom 279.
2. A I R 1926 Bom 344=50 Bom 357.
3. A I R 1931 Bom 582=134 I C 1240=55 Bom 544.

relies on the case of *Parthasaradhi Naidu* v. *Koteswara Rao* (4), where it was held by the Madras High Court that revision of certain orders passed under the Taluka Local Boards Act in that province lay to the Court.

We are however now concerned with S. 15 of the Act of 1925. Comparing that section with the corresponding S. 22 of the Act of 1901, we find that there was an amendment, but the amendment was the substitution of the words "District Court" for those of "District Judge" in the Act of 1901. The difficulty in fact had been in the case dealt with by Sir Norman Macleod in *Gangadhar* v. *Hubli Municipality* (2) that the application had been presented to the clerk of the Court and not to the District Judge personally, and this was clearly the difficulty sought to be got over by the change. Sub-S. (2) however is substantially what it was in the Act preceding the present one, and that is what we have to interpret. Under S. 15 an application has to be made to the District Court under sub-S. (1) and an inquiry has then to be held by the District Judge or Assistant Judge specially empowered under sub-S. (2) by Government. The same subsection then goes on further to empower the specially empowered Judge to summon and enforce the attendance of witnesses and compel them to give evidence as if he were a civil Court, and he may also direct by whom the whole or any part of the costs of such inquiry shall be paid ; and such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure and that the decision or order shall be conclusive.

It seems to me that a clearer case of a persona designata is hard to frame. It is not the District Court, but one of its officers who has to be specifically designated. Such officer does not exercise his ordinary powers in summoning and enforcing the attendance of witnesses, but those specially conferred upon him by the section. Further costs are not recoverable under the ordinary powers of the District Court, but recoverable as if they had been awarded in the case of the exercise of its original jurisdiction. In these circumstances it seems clearly to have been been the intention of the legislature to provide for these applications being heard by one of the officers constituting the District Court, not in the exercise of his ordinary civil jurisdiction, but in special circumstances, which are consistent only with his being a persona designata for the purposes of this section of the Act.

I therefore think that we have no jurisdiction to entertain the application and that the rule must be discharged with costs.

Nanavati, J.—I agree.

K.S. *Rule discharged.*

4. A I R 1924 Mad 561=78 I C 98=47 Mad 369 (F B).

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WADIA, J.

Ramgopal Keshavdas and *others* — Plaintiffs.

v.

Secy. of State and *another*—Defendants.

Original Civil Suit No. 1004 of 1926, Decided on 1st August 1932.

Costs—Two defendants—Only one made liable for plaintiff's "costs of this suit" — Costs in respect of other defendants are also included—Civil P. C., S. 35.

Where one of two defendants is ordered to pay the plaintiffs "the costs of this suit" the costs are to include all the plaintiffs' costs of action, including the costs in respect of the other defendant against whom no relief was obtained, especially when the latter is made a party owing to the former's conduct; it is immaterial, so far as the general costs of the suit are concerned, whether the order in respect of one defendant is made at the same time as the order in respect of the other defendants or is made at different times: *Kelly's Directories, Ltd.* v. *Gavin and Lloyds*, (1901) 2 *Ch.* 763 and *Besterman* v. *British Motor Cab Co., Ltd*, (1914) 3 *K B* 181, *Foll.* [P 107 C 1, 2]

V. F. Taraporewala—for Plaintiffs.

Jamshed Kanga—for Defendants.

Facts. — The plaintiffs filed a suit claiming from the defendants or either of them the sum of Rs. 43,646 odd with interest in respect of 212 bales of fine Berar good cotton, or in the alternative, that the said bales should be delivered to the plaintiffs, and for damages against defendant 1. A notice of demand was sent on 23rd September 1925 making a demand for the loss of goods and stating inter alia that notice had been given of the loss to defendant 2 and that the latter had been informed by the police not to pay the insurance moneys as they were making inquiries. The G. I. P. Railway, which was represented by defendant 1, replied by their

letter of 29th September 1925, stating that they were unable to give any definite reply to the plaintiffs' demand, as the matter was still being investigated by the police. The plaintiffs thereupon filed the suit against both defendants as the suit would otherwise have become time barred. The plaintiffs found after some time that they were unable to maintain their action against defendant 2, and therefore on 16th February 1929 the suit as against defendant 2 was by consent dismissed with costs. Thereafter, on 26th August 1931, the plaintiffs took a decree by consent as between themselves and defendant 1, and under that decree defendant 1 agreed to pay to the plaintiffs the sum of Rs. 16,843-2-0 for debt and interest and "the costs of this suit" when taxed and noted in the margin of the decree.

Judgment.—(After stating the facts as above, his Lordship proceeded). The only question that arises on the summons is as to what was exactly meant by the Court by the words "the costs of this suit." It has been argued by counsel for defendant 1 that the costs of the suit which his client was made to pay to the plaintiffs did not include the costs of the general action, in so far as they had been increased by reason of impleading defendant 2 in the suit. The matter came on before the Assistant Taxing Master for review, and he gave his judgment dated 20th June 1932, which is annexed to his certificate. Reference is made in that judgment to *Kelly's Directories, Ltd.* v. *Gavin and Lloyds* (1). In that suit it was held that where one of two defendants was ordered to pay the plaintiffs "their costs of this action," the costs were to include all the plaintiffs' costs of action, including the costs in respect of the other defendant against whom no relief was obtained. The words in that case were "their costs of this action," and in the suit before me the words are "costs of this suit." The Taxing Master in *Kelly's Derectories Ltd.* v. *Gavin and Lloyds* (1), allowed the plaintiffs all their costs of the action, though the word "all" was not mentioned in the order, and similarly the Assistant Taxing Master here also has allowed the plaintiffs all costs of the suit, although the word "all" does not occur in the consent decree taken as between the plaintiffs and defendant 1. It was sought to distinguish the case of *Kelly's Directories, Ltd.* v. *Gavin and Lloyds* (1), by saying that there the orders made against the two defendants were made at one and the same time or rather were part of one and the same order, whereas the decree here in respect of defendant 2 was made in 1929, and the decree as against defendant 1 was passed in 1931. In my opinion that makes really no difference, for it is immaterial, so far as the general costs of the suit are concerned, whether the order in respect of one defendant is made at the same time as the order in respect of the other defendant or is made at different times. The Assistant Taxing Master, in my opinion was, therefore, right in construing the words of the decree as meaning all costs of the suit in the absence of any qualifying words ln the decree, such as:

" except so far as the costs of the action have been increased by defendant 2 being made parties to the suit."

I have also been referred by counsel for the plaintiffs to *Besterman* v. *British Motor Cab Co., Ltd.* (2). In that suit Vaughan Williams, L. J., pointed out at p. 187 that if the facts and the circumstances of the case are such that in a state of uncertainty it is reasonable for a plaintiff to join both the defendants in order to ascertain which of the two is the really guilty one, then:

" it is part of the reasonable costs of action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame."

I have already stated in the beginning that the action was instituted against both defendants by reason of the answer which the G. I. P. Railway Company gave to the plaintiffs' and therefore this is a case in which all the general costs of the action which have not been disposed of, although the suit is dismissed as against defendant 2, should be borne by the person who is to blame, and that person in this case is the railway company as represented by defendant 1. Under the circumstances the summons will be dismissed with costs. Counsel certified.

R.K. *Summons dismissed.*

1. (1901) 2 Ch 763=70 L J Ch 786=85 L T 399.

2 (1914) 3 K B 181=83 L J K B 1014=110 L T 754=30 T L R 319=58 S J 319.

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BEAUMONT, C. J. AND BLACKWELL, J.

Narayanrao Vithal Sayanna—Defendant—Appellant.

v.

Solomon Moses and *others* — Plaintiffs —Respondents.

Original Civil Appeal No. 25 of 1931, Decided on 2nd September 1932.

Contempt — Civil suit — Comment on, by persons not parties—Contempt is of criminal nature—No appeal lies under Letters Patent (Bom), Cl. 15.

Comments upon a pending trial by persons, some of whom are parties to the suit and some of whom are not, is contempt of a criminal nature, and an appeal is precluded by words of Cl. 15 against an order passed in such matter : *O'Shea* v. *O'Shea and Parnell*, (1890) 15 *P D* 59 and *Scott* v. *Scott*, (1912) *P*. 241, *Rel on* ; 7 *Bom* 5, *Dist*. [P 109 C 1, 2]

F. J. Coltman—for Appellant.

Jamshed Kanga—for Respondents.

Beaumont, C. J. — This is an appeal from an order of Rangnekar, J., in which he dismissed a motion by the appellant to punish the respondents for contempt of Court. The learned Advocate-General on behalf of the respondents has taken the preliminary point that no appeal lies, and it is only necessary to state the facts so far as it is necessary to appreciate the preliminary point. The respondents are persons interested in a certain Jewish Educational Society known as the Bombay Israelite School Managing Committee, and it appears that in 1928 the Committee of that school was intending to rebuild the school premises, and they invited tenders, and ultimately accepted the tender for the new buildings of the present applicant. Disputes subsequently arose between the Committee and the applicant as regards the work which was entrusted to the applicant under the contract, and in the result a suit was started in July 1929 between certain officers of the School Committee as plaintiffs and Vithal Sayanna, the applicant, as defendant, the claim against him being for an injunction to restrain him from committing alleged breaches of the contract and for damages. In February 1931, the Committee of the School issued a pamphlet, which is the document complained of, which is headed "First Progress Report" and is a report submitted by the Committee of this school to the members of the community, and in that pamphlet certain comments are made on the dispute with the present applicant. On 9th February 1931, the applicant took out this notice of motion against the respondents, the first three of whom are plaintiffs in the suit, and the others of whom are not parties to the suit, and he asks for an order for committal of the respondents for their contempt of Court in publishing this pamphlet. Rangnekar, J., refused to make any order and dismissed the motion with costs.

Now, the learned Advocate-General on behalf of the respondents does not dispute that that order is a judgment within Cl. 15, Letters Patent, but he says it is a judgment made in exercise of criminal jurisdiction and is, therefore, not appealable under the clause. The difference between civil and criminal contempt is discussed in Halsbury's Laws of England, Vol. 7, at p. 280. It is there pointed out that disobedience to an order made in a civil suit constitutes contempt of a civil nature, and any application to punish that disobedience by process of contempt is an application of a civil nature. But it is further pointed out that where the alleged contempt consists in interfering with the due trial of a civil suit, that contempt is of a criminal nature, and a fortiori that must be so where the alleged contempt is by persons who or some of whom are not parties to the civil suit. In support of that proposition, and by way of illustrating the sort of contempt which is of a criminal nature certain English cases were referred to. In the first place there is the case of *O'Shea* v. *O'Shea and Parnell* (1). There the respondent had made certain comments upon a trial pending in the Divorce Court, and the Judge in the Divorce Court, on a motion in the divorce suit and also in the matter of the respondent on the motion, had punished the respondent by inflicting a fine upon him. He appealed, and a preliminary objection was taken that no appeal lay having regard to S. 47, Judicature Act, 1873.

That Act provided that no appeal should lie from any judgment of the High Court in any criminal cause or matter save as therein provided, and it was held by the English Court of Appeal that the contempt in that case, consisting as it did of comments upon a pending suit by a person who was not a party to the suit,

1. (1890) 15 P D 59.

was contempt of a criminal nature, and that the order made against the the person in contempt was an order made in a criminal cause or matter within S. 47. That case was followed with approval by the English Court of Appeal in the case of *Scott* v. *Scott* (2). The alleged contempt in that case was the publication of the result of proceedings held in camera, and the Court of Appeal held that that was a contempt of a criminal nature from which no appeal lay. I have not overlooked the fact that that case went to the House of Lords where the decision of the Court of Appeal was reversed, but the result of the decision of the House of Lords was that the order which it was alleged had been disobeyed was made without jurisdiction, and there could be no contempt in disobeying an order which was invalid. Now, I think the result of those cases is to show that contempt, such as is alleged in this case, that is to say, comments upon a pending trial by persons, some of whom are parties to the suit and some of whom are not, is contempt of a criminal nature, and the question which we have to decide is whether an appeal is precluded by the words of Cl. 15, Letters Patent of 1865. The material words are :

> "And we do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment (not being . . . . in the exercise of criminal jurisdiction) . . . ."

It seems to me clear on the English authorities that the order which the learned Judge was asked to make here was to be made in the exercise of criminal jurisdiction. Whether it could be said also to be made "in the course of a criminal trial" within Cl. 25, Letters Patent, is perhaps doubtful. But it seems to me impossible to say that the order was made otherwise than in the exercise of criminal jurisdiction. Mr. Coltman on behalf of the applicant has relied on a decision of this Court in *Navivahoo* v. *Narotamdas Candas* (3). The contempt in that case was contempt of a civil nature, being disobedience to an order of the Court made in a civil suit, and the point was taken that no appeal lay under the Civil Procedure Code because the order in question was not one referred to in S. 588 of the Code. The learned Chief Justice no doubt says that that argument might have prevailed if the order in question had been passed in the exercise of the Court's original civil jurisdiction. He thought that the order was not made in the exercise of the Court's original civil jurisdiction and therefore he says an appeal lies

> "under S. 15, Letters Patent, which provides that an appeal shall lie in the case of every judgment by a single Judge of the High Court not being a sentence or order passed in a criminal trial."

The exact words of Cl. 15 seem not to have been present to the mind of the learned Chief Justice. The words are not "a sentence or order passed in a criminal trial" but "in the exercise of criminal jurisdiction." The case is clearly distinguishable from the present case, because the contempt there was of a civil, and not of a criminal nature. I find it rather difficult to see why the order in that case was not made in the exercise of civil jurisdiction, but the case is not an authority which prevents us from holding that the order made by Rangnekar, J., was an order made under the criminal jurisdiction. That being so, I think the point taken by the learned Advocate-General is right and that there is no appeal in this case. Appeal dismissed with costs.

Blackwell, J.—I agree.

R.K. *Appeal dismissed.*

2. (1912) P. 241=81 L J P 113=107 L T 211=28 T L R 526.

3. (1882) 7 Bom 5.

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PATKAR AND MURPHY, JJ.

Jaichand Somchand Shah — Appelt.

v.

Vithal Bajirao Marathe—Respondent.

First Appeal No. 168 of 1931, Decided on 18th August 1932.

(a) Workmen's Compensation Act (1923), S. 10—Notice is not necessary when workman does not leave service voluntarily—Want of notice can be condoned for sufficient cause.

Notice is not necessary when the workman does not voluntarily leave the service; and the want of notice can be condoned for sufficient cause. Where therefore, an injured workman was removed to the hospital from the factory and he approached the employer several times for compensation and employment, but was referred to Court:

Held: that no notice was necessary, that its absence can be condoned and that even if a notice is necessary, the plaint can be treated as a notice: *A I R* 1929 *Bom* 400 and *Stevens* v. *Insoles, Ltd.*, (1912) 1 *K B* 36, *Ref.* [P 111 C 1]

(b) Factories Act (1911), S.2—S. 2 denotes any composite whole premise with central source of power—Saw mill and ginning fac-

tory worked by same motive power and by 20 men is factory— Workmen's Compensation Act (1923), S. 2 (1) (n).

Section 2, Factories Act, is intended not to cover merely individual business in any premises, but is intended to denote any premises as a composite whole with a central source of power i. e., either steam, water or other mechanical or electrical power. And therefore a saw mill and a ginning factory which are under the same roof and worked by the same motive power is a factory within the meaning of S. 2 (3) (a) if no less than twenty men are employed on the whole premises and a person working in any of these is a workman within the meaning of the Workmen's Compensation Act. [P 111 C 1]

D. B. Mehta—for Appellant.

R. J. Thaker—for Respondent.

Patkar, J.—In this case the respondent, a workman employed in the Khandesh Saw mill at Nandurbar, received an injury to his right hand in December 1929 and made a claim for compensation in the Court of the Commissioner for Workmen's Compensation, Bombay. The Commissioner awarded Rs. 847 as compensation to the respondent.

The first point urged in this appeal is that the respondent did not give notice under S. 10, Workmen's Compensation Act 8 of 1923. The respondent received a serious injury to his right hand and was removed to the dispensary by the employees of the appellant and was in the hospital for one month and twenty days and attended as an outdoor patient for another month. He applied for compensation on several occasions to the appellant and finally in March 1930 made an application in the Court of the Commissioner for Workmen's Compensation. He does not appear to have given written notice to the opposite party but applied verbally. The learned Commissioner held that having regard to the fact that the appellant had constructive notice of the accident and he himself had reported the accident to the Factory Inspector, the want of written notice could be excused.

It appears that sub-Ss. (2) and (3), of S. 10, Workmen's Compensation Act, indicate that the notice required by the section must be in writing though it is not specified in sub-S. (1) whether the notice should be in writing or verbal. The notice must be given as soon as practicable after the happening of the accident and before the workman has voluntarily left the employment in which he was injured. There is no evidence in the case that the respondent voluntarily left the employment in which he was injured. He was removed to the hospital by the employees of the appellant and he several times approached the appellant for compensation and also for employment, but was referred to the Court. It is difficult, therefore, to hold that notice was necessary in the absence of any evidence that the respondent voluntarily left the employment.

Under Prov. 2, the Commissioner can admit and decide the claim notwithstanding that the notice has not been given or the claim has not been instituted in due time as provided in sub-S. (1) if he is satisfied that failure to give the notice or to institute the claim was due to sufficient cause. The learned Commissioner held in the circumstances that want of written notice could be excused. It is contended on behalf of the appellant that want of notice cannot be excused under the proviso but only the delay. The comma after the word "instituted" in the proviso would favour the contention of the appellant. In *Fibre Aloes Factory* v. *Jaffer* (1) it was held that the proviso would apply even supposing no notice whatever had been given. In other words if no notice at all has been given, then "notice has not been given in due time" within the meaning of the proviso. In that case it was held that notice was in fact given and therefore the decision on this point would appear to be obiter.

In *Stevens* v. *Insoles, Ltd*. (2) it was held that the entry made in the company's own book by the manager was a written notice sufficient to satisfy the requirements of the Act and it was further held that because a written notice was not sent to the officials but only recorded in the books of the company, the company could not send their doctor to report was a suggestion which could not be countenanced. It appears that notice under S. 10 is required to be given by a workman before he voluntarily leaves the service in order to enable the employer to have the workman medically examined under S. 11, for the notice requires a statement of the address of the workman so that the workman can be traced wherever he may be

1. A I R 1929 Bom 400=121 I C 577=31 Bom L R 1059.
2. (1912) 1 K B 36=81 L J K B 47=105 L T 67=(1912) Wc & Rep 111.

and be medically examined. I am inclined to hold that no notice was necessary in the present case as the respondent did not voluntarily leave the service of the opponent and that want of notice could be condoned under the proviso. If however a notice in writing is necessary and only the delay could be excused, I would treat the plaint as a notice by the workman. I think it is desirable that both the provisos to S. 14 (1), English Workmen's Compensation Act, 1925, should be reproduced in S. 10, Act 8 of 1923, in order that want of notice may be expressly made liable to be condoned.

The second point urged on behalf of the appellant is that the respondent is not a workman within the meaning of S. 2 (1) (n), Workmen's Compensation Act and Cl. (ii), Sch. 2 of the same Act, as the Khandesh Saw Mill was registered under Cl. (b), S. 2 (3), Indian Factories Act. It appears that the Khandesh Saw Mill and the ginning factory of the appellant are under the same manager and in charge of the same engineer. There is one boiler and one machine which drives the shafting in both the factories and both the factories are in the same premises and under the same roof. A factory is defined in S. 2 (3) (a), Indian Factories Act as

"any premises wherein or within the precincts of which on any one day in the year not less than twenty persons are simultaneously employed and steam, water or other mechanical power or electrical power is used."

I agree with the view of the lower Court that the section is intended not to cover merely individual business in any premises but is intended to denote any premises as a composite whole with a central source of power, i. e., either steam, water or other mechanical or electrical power. I think therefore that the Khandesh Saw Mill and the ginning factory which are under the same roof and worked by the same motive power is a factory within the meaning of S. 2 (3) (a) and no less than twenty men are employed on the whole premises. The third point raised on behalf of the appellant is that the lower Court erred in assessing the disability at 50 per cent. The respondent has lost the little, ring and middle fingers and a large part of the palm of the right hand and the index finger, while the thumb, which has not been amputated, is injured. The thumb has not been amputated, and therefore it cannot be said that there is a loss of the thumb. We do not agree with the contention of the respondent that the injury to the large part of the palm would amount to a loss of an arm. The respondent is entitled to compensation for the loss of the little, ring and middle fingers, which would amount to 15 per cent. and the loss of the index finger would amount to 10 per cent., in all 25 per cent., and it is conceded on behalf of the appellant that the loss of the palm might be assessed at 5 per cent., in all he is entitled to 30 per cent. The respondent, therefore, is entitled to Rs. 504, instead of Rs. 840, for compensation, and adding seven rupees as expenses he is entitled to Rs. 511. The decree of the lower Court would, therefore, be varied by awarding Rs. 511 instead of Rs. 847. The appellant should bear his own costs and pay the costs of the respondent of this appeal.

Murphy, J.—This is an appeal against an award, made by the learned Commissioner for Workmen's Compensation, and it is made by the employing firm. The workman in question was engaged at the Khandesh Saw Mill in Nandurbar when he suffered the accident which occasioned the award, and was injured in the right hand, losing three fingers, while the index finger and right thumb were also injured, most of the palm of the hand being sheared away. The disputed findings are: (1) That the workman gave sufficient notice; (2) that he was a "workman" within the meaning of the Act; and (3) that he suffered a 50 per cent. disability. As to the first point, admittedly, no written notice was given, though a verbal application was made and was held sufficient, in the circumstances, by the learned Commissioner. The formalities as to notice are prescribed in S. 10 of the Act, which requires it "in the manner hereinafter provided," that is as in sub-S. (2), which has a proviso enabling the Commissioner to excuse delay "for sufficient cause." There was here no notice in the manner provided, and the proviso in terms enables delay to be excused, unless one reads the phrase

"notwithstanding that notice has not been given, and the claim has not been instituted in due time"

disjunctively, that is, as allowing the Commissioner to excuse an omission

to give notice, or a delay in instituting the claim, in which case the comma after "instituted" should have been omitted. A second obscurity in this connexion is that notice is required to be given either before the workman voluntarily leaves his employment, or, in the other case, "as soon as practicable and before the claim is made." The former provision has obvious reference to the succeeding sections about a medical examination. In England, the provisions as to notice are very similar, though the corresponding excusing proviso is wider and the requirement as to notice has been so liberally interpreted as to amount almost to a waiver of it. In the case of *Fibre Aloes Factory* v. *Jaffer* (1), an appeal at the hearing of which I was a member of the Division Bench, the learned Chief Justice held that (p. 1066 *of* 31 *B. L. R.*):

"... speaking for myself I am prepared to go one step further, and to say that the proviso would apply even supposing no notice whatever had been given. In other words, if no notice at all has been given, then 'notice has not, I think, been given in due time' within the meaning of the proviso."

Though strictly speaking this opinion is obiter, for in the case then dealt with notice had been given, and the objection made was different, the view is in harmony with the trend of English decisions. There are obvious difficulties in the interpretation of these sections, but the intention clearly was that there should be power to condone irregularities of notice, and the case is not, I think, parallel to similar provisions in the Civil Procedure Code, the Railways Act and in many Acts concerning local authorities. On the whole, therefore, though I feel some doubt, I am prepared, in this case, to allow the learned Commissioner's interpretation. I think the second point has very little substance. The place in question is a single building with one power unit only, and though part of it is used as a saw mill and the remainder as a cotton gin—and so technically there are two enterprises—they share the source of power and the skilled staff, and I think that they must be treated as a single concern, in which case the whole is a "factory" within the Act though the Saw Mill section, if separated, may not be one by itself. I think appellants fail on this point also.

Next comes the assessment of compensation. The loss of three fingers, by the schedule to the Act, is 15 per cent, that of the index finger—which here was not lost, but only damaged—is 10 per cent. —making 25 per cent. in all. The learned Commissioner does not explain how he arrived at 50 per cent, that is 25 per cent more. There was no medical evidence and I do not concede the position taken at the Bar, that the loss of these fingers was that of the use of the whole arm, though this might perhaps be found on proper evidence. What the actual injuries to the index finger and thumb were is not stated, and we cannot estimate them on the papers. I think the proper percentage here would be 30 per cent as found by my learned brother and with whose conclusions I agree.

K.S. *Decree varied.*

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BEAUMONT, C. J. AND RANGNEKAR, J.

Aishabai—Appellant.

v.

Ismail Sakhi and *others* — Respondents.

Original Civil Appeal No. 31 of 1932, Decided on 30th September 1932.

Letters Patent (Bombay), Cl. 15 — 'Judgment' — Order dismissing petition to adjudge person to be lunatic — Lunacy Act (1912), S. 39.

An order dismissing a petition to adjudge a person to be lunatic is not a 'judgment' within the meaning of Cl. 15, Letters Patent, and hence no appeal lies from such order: *A I R* 1932 *Bom* 163, *Ref.* [P 113 C 1; P 114 C 1, 2]

V. F. Taraporewala and *B. D. Boovariwala*—for Appellant.

Jamshed Kanga and *K. S. Shevaksha*—for Respondents.

Beaumont, C. J.—This is an appeal from an order made by Blackwell, J., dismissing the petition of a wife to have her husband adjudicated a lunatic. The appellant is the wife, and a preliminary point is taken that from such an oredr she has no right of appeal. That question involves in the first place the question whether the order is a judgment within Cl. 15, Letters Patent, a question which has very frequently been considered in this Court. I may for convenience refer to a short summary of the decisions in a judgment of mine in *Ramanlal* v. *Chunilal* (1), where at p. 253 (*of* 34 *B L R*), I said:

1. A I R 1932 Bom 163=137 I C 397=56 Bom 268.

" . . . putting it shortly, the view which has always prevailed in this Court since the decision in *Miya Mahomed* v. *Zorabi* (2) is that any order affecting the merits of the question between the parties by determining some right or liability is a judgment within Cl. 15, Letters Patent."

In that case, and in the cases on which the summary was based, the question arose in a suit inter partes, but references to the order affecting the merits of the question between the parties must not be taken as meaning that there can be no judgment within Cl. 15, Letters Patent, except in some proceeding inter partes. It is, I think, clear that there is nothing in Cl. 15, which would justify such a limitation, and indeed I feel no doubt whatever that a judgment of the Court declaring a person to be a lunatic would be a judgment within the meaning of Cl. 15, Letters Patent. But the question with which we have to deal is whether an order refusing to declare a person lunatic is a judgment within that clause, and if it is, whether the wife of the alleged lunatic can exercise the right of appeal. Mr. Taraporewala for the appellant puts his case in two ways. He says, first of all, that the wife has certain contingent rights in the property of the lunatic, because the Court might make an order giving her some right of maintenance out of the property of the lunatic under S. 46, Lunacy Act, and that the order affects those rights. There is, I think, no force in that contention. The Court of Lunacy acts in the interests of the lunatic, and not in the interests of the relative of the lunatic. When an order is made giving the wife or other relative a right to maintenance out of the lunatic's property, the Court acts on the footing that the lunatic himself would desire such an order to be made. But, in my opinion, neither the wife nor any other relative can be said to have any right in the property of the lunatic which is interfered with by the order of the Court adjudicating or refusing to adjudicate a person a lunatic.

Then Mr. Taraporewala puts his case on an alternative ground, which offers a more hopeful prospect. He says that the alleged lunatic has a right to the protection afforded to him by the Lunacy Act, and that the order made by Blackwell, J., deprives him of that right. I think the answer to that is that the order of the learned Judge refusing to adjudicate a man a lunatic cannot be treated as a judgment at all, because it leaves the parties in precisely the same position as they were in before, and does not affect anybody's rights. All that the order does is to hold that at the date of the petition there was no sufficient evidence of lunacy. I think therefore that the order is not a judgment within Cl. 15, Letters Patent, but, even if it be, I fail to see how the wife of the alleged lunatic can appeal from it. The only possible appellant, I think, would be the alleged lunatic himself, who is not likely to prefer an appeal. The man in question not having been proved to be a lunatic or incapable of managing his affairs, it is not competent, in my opinion, for his wife or anybody else to act on his behalf. Under S. 39, Lunacy Act, express power is given to a relative of the alleged lunatic or the Advocate-General to apply for an inquisition. That is the section under which the wife applied in the present case. But there is no section in the Lunacy Act, which enables a relative or the Advocate-General to prefer an appeal against an order made on the inquisition. If a man be adjudged lunatic there are rules under which a next friend can be appointed, but, in my opinion, in the absence of some statutory provision neither the wife nor any other relative nor the Advocate-General is competent to prefer an appeal on behalf of a man against whom no order has been made. That being so, I think the preliminary objection must be upheld and the appeal must be dismissed.

Rangnekar, *J.*—The question raised by the preliminary objection on behalf of the respondents is whether it is open to the appellant to maintain this appeal. The appeal is from an order made by Blackwell, J., on the petition of the appellant under S. 39, Lunacy Act, for an order that her husband should be adjudged a lunatic under the provisions of that Act. The learned Judge on the materials before him was of opinion that the alleged lunatic was not proved to be of unsound mind or incapable of managing himself and his affairs, and dismissed the petition. Now in order to understand the preliminary objection, it is necessary to consider the nature of the proceedings taken by the appellant. The petition is headed "In the matter of the

2. (1909) 2 I C 157.

Lunacy Act and In the matter of Ismail Sakhi," &c. Then the name of the petitioner, the present appellant, is mentioned. The petitioner submitted in the last part of the petition that an inquiry be held as regards the mental capacity of the petitioner's husband. It is obvious that this petition was made under the provisions of Part 3, Ch. 4, Lunacy Act. The heading of that Part is "Judicial Inquisition as to Lunacy." S. 37 says that the High Court of Bombay along with the other High Courts has jurisdiction under this chapter. S. 38 says that the Court may, upon application by order, direct an inquisition whether a person subject to the jurisdiction of the Court who is alleged to be a lunatic is of unsound mind and is incapable of managing himself and his own affairs. S. 40 provides for notice to be given to the alleged lunatic and his other relatives. S. 41 empowers the Court to require a lunatic to attend for the purpose of being personally examined by the Court or by any other person from whom the Court may desire to have a report as to the mental capacity and condition of the alleged lunatic. Then comes S. 46 under the heading "Judicial powers over person and estate of lunatic," and that section refers to the custody of the lunatic and the management of his estate.

Now, it is clear from the scheme of the Act, to which I have briefly referred, that the right, if any, of the petitioner is exhausted after the application of the petitioner is entertained by the Court, and it is entirely the Court's privilege upon the application to direct an inquisition, and the matter thereafter becomes one really between the Court and the alleged lunatic. There is no provision in the Lunacy Act, which shows that the applicant, as such, is entitled to take part in the proceedings, once the application is entertained. This being the scheme of the Act, it is clear, in my opinion, that it can hardly be said that when an application of this nature is dismissed, the order "determines some right or liability." Mr. Taraporewala says that the order determines and affects the rights of his client as to maintenance, &c., and refers to S. 46 of the Act. I do not think that a contingent right of maintenance which may or may not be declared and dependent on there being property or not belonging to the lunatic is such a right as would make the order in question a "judgment" within the meaning of the current of decisions as to what a "judgment" is under Cl. 15, Letters Patent. It can hardly be disputed that an inquisition under the Lunacy Act is primarily in the interest and for the benefit of the alleged lunatic and not in the interest of anyone else.

The learned counsel next contends that the order is a "judgment" because it affects the lunatic and determines his right. I do not agree, as the effect of the order is to leave the matters in statu quo and to leave the alleged lunatic in the position in which he was before the inquisition. The order merely means that the Court on the evidence on the inquisition is not satisfied that the person alleged to be a lunatic is a lunatic. In my opinion therefore an order dismissing a petition to adjudge a person to be a lunatic is not a "judgment" within the meaning of Cl. 15, Letters Patent. The second objection raised by the Advocate-General is that the appellant has no right to appeal from the order in question. As I have pointed out, the scheme of the Act is that the right of the relative of an alleged lunatic is exhausted as soon as an inquisition is ordered. It is conceded that no right of appeal is given by the statute. It is clear on the authorities that a party has no right of appeal unless it is conferred by a statute. There is considerable force in the contention that the appellant cannot maintain the appeal, but in view of the conclusion to which I have come, it is not necessary to express any definite opinion on the point. I agree therefore that the preliminary objection must be upheld and the appeal dismissed.

K.S. *Appeal dismissed.*

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PATKAR AND MURPHY, JJ.

Ramchandra Khaserao Thorat and *others*—Plaintiffs—Appellants.

v.

Ganesh Balwant Tagare and *others*—Defendants—Respondents.

Second Appeal No. 397 of 1929, Decided on 25th July 1932.

(a) Civil P. C. (1908), S. 100—Second Appeal—Concurrent findings of lower Courts on evidence—Practice.

The concurrent finding of the lower Courts based on evidence must be accepted in second appeal. [P 115 C 2]

*** (b) Limitation Act (1908), Arts. 144 and 148—Purchase of some of mortgaged properties—Redemption of all properties under mortgage by purchaser—Suit for unsold properties by mortgagor against purchaser is governed by Art. 144 and not by Art. 148—T. P. Act (1882), S. 95.**

T who had mortgaged four lands to *Y* sold two of them to *G*. *G* brought a suit against *T* and *Y* for redemption of the properties and obtained possession of all the four lands.

Held: that *G* by virtue of the redemption of the whole mortgage acquired a charge on the lands not sold to him, that a suit by *T* to recover possession of those lands on payment of proportionate amount of expenses incurred in redemption was governed by Art. 144 and not Art. 148 and that as *G* was not cosharer *T's* suit will be barred under Art. 144 after the lapse of 12 years from the date when *G* redeemed and held the lands as owner: 26 *Bom* 500; 41 *Mad* 650 and *AIR* 1919 *Cal* 634, *Rel. on.*; 14 *All* 1 (*FB*), *Diss. from*; *A I R* 1922 *Bom* 150 and 15 *I C* 500, *Dist.*; 11 *Bom* 422; 35 *Bom* 438 and *A I R* 1931 *Cal* 251, *Ref.* [P 116 C 1, 2]

K. N. Koyajee—for Appellants.

M. R. Jaykar and *K. A. Padhye*—for Respondents.

Patkar, J.—The suit lands, survey Nos. 154, 155, 156 and 157, belonged to Thorats who mortgaged them to Yadavs in 1877. In 1891 survey Nos. 156 and 157 were sold to Tagares by two documents, Exs. 62 and 63, for Rs. 99 each. Tagares brought a suit in 1904 against the original mortgagees Yadavs for redeeming the properties comprised in the mortgage of 1877. To this litigation the original owners, Thorats, were parties. Thorats contended in that litigation that the sale deeds in favour of Tagares were in the nature of mortgages, but the contention was overruled and Tagares were allowed to redeem on payment of Rs. 1,562-8-0. Tagares obtained possession in 1906. The plaintiffs Thorats have brought the present suit in 1924 against Tagares for redemption and accounts of the mortgage transactions and for possession of the suit properties. Both the Courts held that the sale deeds relating to the lands, survey Nos. 156 and 157, were in fact transactions of sale and not mortgage. With regard to the other two survey Nos. 154 and 155 the Subordinate Judge held that Tagares occupied the position of the original mortgagees and that Art. 148, Lim. Act, applied and not Art. 144, and therefore allowed redemption of the lands, survey Nos. 154 and 155, on payment of the proportionate amount of Rs. 665-8-0.

On appeal, the learned Assistant Judge held that the suit relating to survey Nos. 154 and 155 was barred by limitation under Art. 144, Lim. Act, and as he confirmed the finding of the lower Court that the transactions relating to survey Nos. 156 and 157 were in fact sales, he dismissed the suit. In this appeal it is urged on behalf of the appellants that the finding that the transactions relating to survey Nos. 157 and 156 were sales and not mortgages should not be accepted. Further it is urged that the suit to get possession of survey Nos. 154 and 155 is not barred by limitation on the ground that Tagares stood in the position of strangers and became subrogated to the rights of the mortgagees according to the decision in *Tangya Fala* v. *Trimbak Daga* (1). It is also urged that if under S. 95, T. P. Act, the redemption by Tagares gave them a charge on survey Nos. 154 and 155 and Art. 144, Lim. Act, applied, the suit relating to survey Nos. 154 and 155 would not be barred till it was proved that Tagares set up an adverse title and their possession commenced to be adverse to Thorats, the original owners of the property, more than 12 years before suit. The question as to the real nature of the transactions relating to survey Nos. 156 and 157 was litigated between the parties in the previous suit for redemption brought by Tagares against the original mortgagees, Yadavs. In that suit the original mortgagors Thorats were parties and it was held that the transactions represented a sale and not a mortgage of the two survey numbers. The concurrent finding of both the Courts, based on the evidence in the present case, even apart from the previous decision, that the transaction relating to survey Nos. 156 and 157 represented a sale and not a mortgage must be accepted.

The next question is whether the suit of the plaintiffs Thorats relating to survey Nos. 154 and 155 is in time. The case of *Tangya* v. *Trimbak* (1) does not bear on the question of limitation. In that case a stranger, who paid off a subsisting mortgage, was considered as subrogated to the position of the mortgagee on the analogy of S. 95, T. P. Act. The suit related to the enforcement of the equitable right of a person who paid off a subsisting mortgage and did not relate to the question of limitation which

1. (1916) 40 Bom 646=35 I C 794.

arises in the present case. So far as survey Nos. 156 and 157 are concerned, Tagares acquired the rights of the original owners and brought a suit for redemption against the mortgagees to which the Thorats were parties. As the mortgage was indivisible, Tagares were allowed to redeem all the four survey numbers on payment of the amount due on the mortgage. Tagares had acquired title to survey Nos. 156 and 157, but so far as survey Nos. 154 and 155 were concerned they were in the position of strangers, though it might be said that they had acquired a right to a portion of the equity of redemption by purchase of two out of the four properties comprised in the mortgage. In a case where a cosharer redeems a mortgage and gets possession of the whole property, it is held by this Court that Art. 144, Lim. Act, applies and not Art. 148 to a suit brought by the other cosharer to recover possession of the property on payment of a proportionate part of the mortgage debt. In *Vasudev* v. *Balaji* (2) it was held, dissenting from the judgment of the Allahabad High Court in *Ashfaq Ahmad* v. *Wazir Ali* (3), that Art. 148 would be inapplicable on the ground that the position of a redeeming mortgagor is that of a charge holder and a distinction is drawn between a charge and a mortgage in the Transfer of Property Act by S. 100, and what a redeeming co-mortgagor has is a charge and not a mortgage, and therefore Art. 148 would not apply. It was also held that the suit was barred by limitation after 12 years from the date of the redemption under a decree passed against both the mortgagors. This position has now been accepted by the Madras High Court in *Munia Goundan* v. *Ramasami Chetty*(4), and by the Calcutta High Court in *Purna Chandra Pal* v. *Barada Prosanna Bhattacharjya* (5).

Section 95, T. P. Act, before its amendment by Act 20 of 1929, refers to one of several mortgagors redeeming the mortgaged property, and it says that:

"where one of several mortgagors redeems the mortgaged property, and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his portion of the expenses properly incurred in so redeeming and obtaining possession."

Tagares in this case cannot be said to be one of the several mortgagors, nor can they be said to be cosharers with Thorats. They were entitled to a portion of the equity of redemption in the two lands, survey Nos. 156 and 157, and so far as survey Nos. 154 and 155 were concerned, they had no title as cosharers. In *Umar Ali* v. *Asmat Ali* (6) reference is made to S. 95, T. P. Act, as being an unskilfully drawn and clumsily worded section and the phrase "one of several mortgagors" was held to mean one of the several persons interested in the equity of redemption, and the expression "expenses properly incurred in so redeeming" included the mortgage debt. It is clear therefore on the authorities, that by virtue of the redemption by Tagares of the whole mortgage, they acquired a charge on the properties, survey Nos. 154 and 155, under S. 95, T. P. Act, and a suit by Thorats to recover possession of those survey numbers on payment of the proportionate amount of the expenses incurred in redemption will be governed by Art. 144, Lim. Act, and not by Art. 148 of the Act. A distinction is however drawn where a cosharer redeems a mortgage and it is held that the possession of the cosharer after redemption is on behalf of all the cosharers, and therefore though a cosharer has redeemed the properties and has acquired a lien under S. 95, T. P. Act, his possession does not contradict the possession of the other cosharers, and his possession is presumably on behalf of all, and unless there is ouster, adverse possession under Art. 144 would not begin.

In *Ramachandra Yashvant* v. *Sadashiv Abaji* (7) it was held that the holding by a cosharer as a lienor did not, in any way, contradict the ulterior proprietary right of his cosharer, and it was observed as follows (p. 424):

"On the contrary, it implied and preserved their right, since it would be impossible for a man to hold a lien on his own property. But, then, as long as a possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right, rather than to a right which contradicts the ownership."

2. (1902) 26 Bom 500=4 Bom L R 178.
3. (1889) 14 All 1=(1891) A W N 211 (F B).
4. (1918) 41 Mad 650=45 I C 867.
5. A I R 1919 Cal 634=45 IC 783=46 Cal 111.
6. A I R 1931 Cal 251=130 I C 889=58 Cal 1167 (F B).
7. (1886) 11 Bom 422.

In *Vasudev* v. *Balaji* (2) the finding of the lower Courts that the cosharers' possession was adverse was accepted and the suit was held barred under Art. 144. In *Bhaiji Shamrao* v. *Hajimiya Mahamad* (8), where one of the tenants-in-common redeemed the mortgage without the knowledge of the other cotenant, it was held by Scott, C. J.. on difference of opinion between Beaman, and Hayward, JJ., that the possession of joint property by one cosharer did not constitute adverse possession against any other cosharer until there had been a disclaimer of the latter's title by open assertion of a hostile title by the former. It was held by Beaman, J., that a suit would be barred by Art. 144 whether redemption was with or without the knowledge of the cosharers. Hayward, J., differed. The precise point was not discussed in the judgment of Scott, C. J., who followed the previous decisions of this Court, and held that the possession of joint property by one cosharer did not constitute adverse possession against any other cosharer until there was a disclaimer of the latter's title. In the present case Tagares were not cosharers in any sense of Thorats, and therefore the principle that the possession of a cosharer is on behalf of all the cosharers would not apply. The case of *Chandbhai* v. *Hasanbhai* (9) can also be distinguished on the ground that it was a case of a cosharer redeeming the mortgage. It therefore follows that if Art. 144 applies and a stranger redeems the property and holds it as owner to the knowledge of the original owner, the title to recover possession on payment of the proportionate part of the mortgage money would become barred under Art. 144 after the lapse of 12 years. The case of a cosharer or a tenant in common redeeming the mortgage stands on a different footing.

In *Sambu* v. *Nama* (10) the redemption was at the request of the original mortgagor and it was held that the possession of the strangers redeeming the property at the instance of the plaintiff was in their position as lienors, and that the lien would exist for 12 years and that after the expiration of the 12 years their lien would be gone and their possession thereafter would be of persons holding without any right and the suit by the original owner would be barred by limitation by the efflux of 12 years from the date of the extinction of the lien. It is somewhat difficult to follow the reasoning in that case, as in the case ef *Vasudev* v. *Balaji* (2) the possession of even a cosharer who was in possession as a lienor under S. 95, T. P. Act, was held to be adverse on the evidence in the case from the date of the redemption, but the facts in that case are quite distinguishable as the redemption was at the request of the original mortgagors.

In the previous suit Thorats objected that the transaction with reference to the two Survey Nos. 156 and 157 did not represent a sale, but represented a mortgage, and they were parties to the redemption decree and knew that Tagares, who had no title to Survey Nos. 154 and 155 redeemed them under the decree and remained in possession. Their possession therefore to the knowledge of Thorats was open, notorious and exclusive, and the suit of Thorats would become barred by limitation under Art. 144 after 12 years from the date when Tagares obtained possession. In *Munia Gounden* v. *Ramasami Chetty* (4), where redemption was effected by the purchaser from the father of ancestral property, it was held that the possession of such purchaser after redemption was that of a lienor under S. 95, T. P. Act, and the suit of the purchaser from the son was not governed by Art. 148, Lim. Act, but was barred under Art. 126, or in the alternative under Art. 144. It was observed by Sadasiva Ayyar, J., as follows (p. 658):

> "In this case it is clear on the proved documents and the facts found by the lower appellate Court that defendant 3 when he purchased in 1897 had the animus to claim title as the sole owner of the equity of redemption and not merely to claim title to defendant 1's father's one-fourth share, and that he took possession in April 1898 with the animus to hold the whole half-share against all the world and not a mere cosharer with defendant 1 in that half-hare."

The same view was accepted in *Purna Chandra Pal* v. *Barada Prosanna Bhattacharjya* (5) where it was held, following the decision in the case of *Vasudev* v. *Balaji* (2), that a suit brought more than 12 years from the date when the charge came into existence and more than 12 years from the date when exclusive possession was obtained in a suit

8. (1912) 15 I C 500.
9. A I R 1922 Bom 150=64 I C 205=46 Bom 213.
10. (1911) 35 Bom. 438=12 I C 362.

for redemption, would be barred ander Art. 144, Lim. Act. In the present case, Tagares obtained possession of Survey Nos. 154 and 155 with the animus of holding the property as against the whole world and had no intention to hold it on behalf of the original owners Thorats. The claim therefore of the original owners, Thorats, was rightly held by the learned Assistant Judge to be barred by limitation. The appeal therefore must be dismissed with costs.

Murphy, J.—The facts are that the original owners, the Thorats, mortgaged four separate numbers in 1877 to a man named Jadhav for Rs. 1,000. In 1891 they sold the equity of redemption of two of these survey numbers to Tagares, by two separate deeds each for Rs. 99. In 1904 Tagares sued to redeem the four survey numbers covered by the mortgage, as they were bound to do, and were decreed redemption. They did redeem and got possession in 1906. The original owners, the plaintiffs, were parties to the suit. The defendants were in possession from 1906 to 1924 when this suit was brought. It was to redeem the two survey numbers which had been redeemed by Tagares, but in which it is now contended the original owners still had the equity of redemption. The suit has failed in the Court below, on the ground that it is governed by the 12 year limitation rule in Art. 144, Lim. Act, and not by Art. 148 which fixes the period of limitation for a suit to redeem. The question turns on a finding as to the real character of the possession of a person interested only in a portion of mortgaged property, who redeems the whole mortgage. It is clear that under S. 95, T. P. Act, he holds a charge on it, which he can enforce within the period of limitation set out in Art. 132. He is in the position of the mortgagee to that extent, but does this make him a mortgagee? If not a mortgagee, is he a co-owner, and if so, from what point does his adverse possession begin, if his possession is adverse at all?

There is no decided case on the exact point. We have been referred to the cases of *Ramchandra Yeshvant* v. *Sadashiv Abaji* (7), *Vasudev* v. *Balaji* (2), *Tangya Fala* v. *Trimbak Daga* (1), and *Bhaiji Shamrao* v. *Hajimiya Mahamad* (8). But these are all cases of co-sharers, where the point of departure for limitation would be as in Art. 144. Here the redeeming mortgagor had no interest in the property in question, and was merely holding it as having been compelled to redeem it and so long as the charge he had on it was not discharged. The leading case seems to me to be that of *Vasudev* v. *Balaji* (2). In this case the other party interested was a co-mortgagor and 12 years' limitation was held to apply by Sir Lawrence Jenkins and the point of departure was the date of redemption. The other point—the real character of the transaction of the sale of the equity of redemption by Exs. 62 and 63—has been found against the appellants on the facts by both Courts below. I think that the suit was not in time and that the appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

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MURPHY AND NANAVATI, JJ.

Lakshman Ramchandra Phatak— Applicant.

v.

Shridhar Waman Joshi—Opponent.

Civil Appln. No. 742 of 1931, Decided on 15th September 1932.

*** Civil P. C. (1908), O. 41, R. 5 — Appellate Court can stay execution even where decree-holder has not applied for execution.**

Stay can be ordered in anticipation of execution as well as in the case in which an application for execution has been made or an order for execution has been obtained. There seems to be nothing in Cl. 2, R. 5 to prevent an appellate Court for sufficient cause ordering stay of execution of a decree, whether an application to execute it has in fact been made or not; 25 *Bom* 583 and 38 *Cal* 754, *Dist.* [P 119 C 2; P 120 C 1]

S. Y. Abhyankar—for Applicant.

K. V. Joshi—for Opponent.

Murphy, J. — These are two applications in the same matter, one being for an injunction to prevent the decree-holder putting his decree into execution, and the other for stay of the same decree. They arise in the following circumstances. The applicants, who were the defendants in the original suit, succeeded in the first Court, but failed to prove that they were permanent tenants in the Court of appeal, and possession in favour of the Jahagirdar was decreed against them. They have appealed to this Court, and also made an application for stay of execution, and in view of the ruling of Baker, J., in *Gangappa* v. *Mahadevgauda* (1) and on the Regis-

1. Bombay Civil Appln. No. 343 of 1931.

trar's initiative, they brought the matter to Court. In that case Baker, J., has held that no application for stay of execution can be entertained where execution has not so far been applied for. The authority he relies on is that of *Janardan* v. *Nilkanth* (2) and *Srinibash Prasad Singh* v. *Kesho Prasad Singh* (3). Prima facie the ruling of *Janardan* v. *Nilkanth* (2) appears to be applicable, but on an analysis it seems to me that it is not. It is stated in the report that the application for stay was made under (old Code) S. 545, but in the judgment their Lordships say:

"This application was made under S. 545, Civil P. C. It is not alleged that any order has been made for the execution of the decree; therefore no order can be passed under S. 546, Civil P. C. We discharge the rule with costs."

From the latter part of the ruling and from the statement of the facts in the preliminary part, it would appear that the question then was in respect of movable property, and as far as we can gather, that it was treated as an application under S. 546 perhaps in the course of the arguments, and what their Lordships say is that no order can be made under that section (now O. 41, R. 6), which would obviously be so, since the two parts of that rule each begin with expressions negativing such an order being made, these being: "Where an order is made for the execution" and "where an order has been made for the sale." I think that *Janardan* v. *Nilkanth* (2) is an authority on R. 6 and not on R. 5. The case of *Srinibash Prasad Singh* v. *Kesho Prasad Singh* (3) does not seem to have any direct application here. There is no ruling there on the point we now have to decide, and the decision turned on the question whether the Secretary of State had legally pledged his authority for the security offered by the Government of Bengal or not, and it was held that he had not. No other authority has been quoted to us, and I must turn to the words of R. 5.

In the first sub-rule there are two clauses. The first provides that an appeal shall not operate as a stay of proceedings under the decree or order appealed from, except so far as the appellate Court may order, and the second, that the execution of a decree shall not be stayed merely because an appeal has been preferred, but that the appellate Court may for sufficient cause order stay of execution of such a decree. Cl. 1 applies to proceedings, and the second to execution of decrees, and there seems to me to be nothing in Cl. 2, which is now the relevant one, to prevent an appellate Court for sufficient cause ordering stay of execution of a decree, whether an application to execute it has in fact been made or not. We are aware that it is the practice of this Court to allow stays in such cases, and as far as I can see, there is nothing to forbid an order of stay of such a nature. We therefore confirm the rule in C. A. No. 742 of 1931 on the security already furnished, which is to be continued till the decision of the appeal. Costs to be costs in the appeal. The rule in C. A. No. 1125 of 1931 is discharged. No order as to costs.

Nanavati, J.—The question raised in this application is whether under O. 41, R. 5, the appellate Court can order stay of execution of the decree appealed from only if an order for execution has been made by the lower Court. In terms R. 5, O. 41, does not lay down any such limitation on the power conferred by it. All that it says is:

"but the appellate Court may for sufficient cause order stay of execution of such decree."

The condition that an order for execution must have been made is to be found only in R. 6, O. 41, and that is in respect of taking security from a successful decree-holder who is executing his decree. It is there provided that such a decree-holder may be required by the Court to furnish security for making restitution in case the decree or order of the appellate Court goes against him. The reason for that requirement in R. 6 is obvious. Unless the decree is being executed the stage at which the decree-holder is to be required to furnish security for restitution cannot arise. But the circumstances contemplated in R. 5 are different. No doubt the appellate Court is not to stay execution unless certain conditions are fulfilled, the nature of which is indicated in sub-R. (3) of that rule. But assuming that those conditions are fulfilled, and that the appellate Court does think that there is sufficient cause for ordering stay of execution, I do not see why it should be laid down as an additional requirement that this power must not be exercised unless

2. (1901) 25 Bom 583=3 Bom L R 142.
3. (1911) 38 Cal 751=9 I C 862.

the decree-holder has in fact proceeded to execute the decree. Indeed the laying down of such a requirement would in many cases defeat the object that is sought to be achieved under this rule. The judgment-debtor is not in a position to know when the decree-holder intends to move the Court for executing his decree, and if he is to be prevented from taking a precautionary measure, namely, that of moving the appellate Court to stay execution in anticipation of the decree-holder's move, it seems to me that the protection sought to be afforded to him under this rule might prove illusory. It is argued by Mr. Joshi that the words "stay of execution of such decree" imply that there must be an attempt to get the decree executed before such an attempt can be stayed. But I do not think that the words imply any such limitation. Stay can be ordered in anticipation of execution as well as in the case in which an application for execution has been made or an order for execution has been obtained. In view therefore of the object which this rule seeks to attain, namely, to protect an appellant from substantial loss or hardship which might result from the execution of a decree which is under appeal and which is liable to be set aside in appeal, I think that no such limitation as is suggested can be read into the words of this rule. And I think that in a suitable case the appellate Court has power to order stay of execution of a decree which is under appeal, even though the decree-holder may not have applied to execute the decree.

As pointed out by my learned brother the ruling in *Janardan* v. *Nilkanth* (2) really is a decision under old S. 546 which corresponds to R. 6, O. 41, and I agree that it does not lay down any restriction on the power to stay execution conferred under R. 5, as is contended in this case.

V.S. *Order accordingly.*

A. I. R. 1933 Bombay 120

BEAUMONT, C. J. AND RANGNEKAR, J.

Trimbak Y. Nene—Applicant.

v.

Ramchandra B. Tilak—Non-Applicant.

Original Civil Jurisdiction Appeal No. 22 of 1932, Decided on 11th October 1932.

(a) Bombay High Court Rules (1933) (Original Side) R. 767—Appeal — Security for costs—Costs of appeal likely to be heavy is no ground for demanding further security—Practice.

Where an appellant deposits security for costs of respondent as in the normal course, the fact that the costs in the appeal are likely to be heavy is no ground for demanding further security from the appellant : 13 *Bom* 458 and *A I R* 1933 *Bom* 399, *Foll.* [P 120 C 2]

(b) Practice—Precedents.

Where the decisions based on a rule are uniform and settled and if any alteration is to be made, it should be by way of altering the rule, and not by judicial decisions under the rule at variance with former decisions. [P 120 C 2]

F. J. Coltman—for Applicant.

M. V. Desai—for Non-Applicant.

Beaumont, C. J.—This is a notice of motion by the respondent asking for an order on the appellant to deposit further security in the appeal. The ground on which the application is made is substantially this: that the appeal is likely to be a very heavy one, and that the costs will very greatly exceed the sum of Rs. 500 which has been lodged as security in the normal course. R. 767 of the High Court Rules (O. S.) provides that the appellate Court may in its discretion on sufficient cause being shown order that such further amount shall be deposited by the appellant as security for the costs of the respondent in the appeal . . . . as it thinks fit. If the matter were res integra it might well be contended that the fact that the costs of the appeal are likely to be heavy is one ground for saying that sufficient cause has been shown for increasing the amount of the security. But the current of authority in this Court has undoubtedly been against that view. There appears to be no reported case in which further security has been ordered merely on the ground that the amount of the costs of the appeal is likely to be heavy. On the other hand I think the cases of *Ahmed* v. *Sheik Essa* (1) and *Ratanchand* v. *Domji* (2) show that that is a ground on which the Court will not act.

It is desirable that the practice should be settled, and we ought therefore to follow the decisions which have been given. If any alteration is to be made, it should be by way of altering the rule, and not by judicial decisions under the rule at variance with former decisions

1. (1889) 13 Bom 458.
2. A I R 1923 Bom 399=73 I C 474.

We must therefore dismiss the notice of motion with costs.

Rangnekar, J.—I agree.

K.S. *Motion dismissed.*

A. I. R. 1933 Bombay 121

MURPHY AND NANAVATI, JJ.

Moti Meghaji Marwadi and *others*—Defendants—Appellants.

v.

Amarchand Rajaram Marwadi — Plaintiff—Respondent.

Second Appeal No. 32 of 1931, Decided on 21st September 1932.

Hindu Law—Partition — Mortgagee from one coparcener can maintain suit for partition of joint family property.

Under the Hindu law as administered in the Bombay Presidency a mortgagee from a coparcener in a joint Hindu family who is entitled to claim possession of the mortgaged property under the mortgage deed can maintain a suit for partition of the joint family property: 11 *B H C* 72, *Dist.*; 27 *Mad* 361 and 3 *A L J* 474, *Ref.* [P 122 C 1]

H. C. Coyajee and *J. G. Rele*—for Appellants.

G. N. Thakor and *G. M. Joshi* — for Respondent.

Nanavati, J.—This is a second appeal from an appellate decree of the District Court of Poona reversing the decree of the Court of the Subordinate Judge at Poona in Civil Suit No. 413 of 1927. The plaintiff in that suit sued for partition of two houses mentioned in the plaint as being the mortgagee from defendant 1, who was a member of a joint family consisting of himself and his uncle defendant 6. The mortgage is of 27th September 1919, and purports to make over possession to the mortgagee, the mortgagor executing a rent note in his favour. The appellants are original defendants 3, 4 and 5, who are in possession of one of the two houses in suit, house No. 45, having purchased the same in 1920 from the uncle of defendant 1, who was defendant 6. The principal contention on which this appeal turns was raised in issue 2 in the original Court, namely, whether the suit for partition was maintainable. It was contended that the plaintiff being the mortgagee from a coparcener in a joint Hindu family who was not in possession of the property at the date of the mortgage, was not entitled to maintain the suit for partition and possession. That issue was decided against the plaintiff by the learned Subordinate Judge, and he accordingly dismissed the suit. On appeal to the lower appellate Court, the learned Assistant Judge held that the suit was maintainable. He pointed out that a purchaser of the rights of a coparcener in a joint Hindu family would have the right to maintain a suit for partition. The principle is stated in Edn. 7 of Mr. Mulla's Hindu Law, p. 301, S. 261 (2), as follows:

"In Bombay and Madras the purchaser of the undivided interest of a coparcener in a specific property belonging to a joint family is not entitled to a partition of that property alone, for his vendor himself could not have claimed it, unless the other coparceners consent to it, and he can only enforce his rights by a suit for a general partition."

And as regards the mortgagee it is stated at p. 306 S. 263, (1), that "the principles 'laid down in S. 261 above' apply mutatis mutandis to a mortgagee of joint family property from a coparcener."

The learned Assistant Judge also pointed out that the mortgage deed in a suit was a combination of a simple and a usufructuary mortgage, and entitled the mortgagee to ask for possession. He considered that the fact that defendant 1 was not actually in possession of the property at the time of the execution of the deed, Ex. 35, did not mean that the plaintiff was not entitled to possession. He accordingly held that the plaintiff was entitled to maintain the suit, and he reversed the decree of the trial Court. The defendants have therefore come up here in second appeal. This decree has been attacked, firstly, on the ground that the plaintiff has asked for partition of specific property and not for a general partition. That contention however does not seem to be well founded, because in answer to the written statement the plaintiff has filed a reply in which he has stated that there is no other property belonging to the joint family and that if there is any he is willing to have it included in the suit. It has not been pointed out that any such property was shown to exist, and therefore the contention that the suit is not for a general partition cannot be successful.

Then the second point taken up is that as mortgagee from a coparcener who was not himself in possession, the remedy of the plaintiff is not to ask for partition and possession, but merely to bring the right, title and interest of his mortgagor to sale in enforcement of the mortgage. Now it may be a difficult question on which there appears to be no clear autho-

rity whether a mortgagee who is not entitled to possession can ask for partition of the joint family property. Our attention has been drawn to certain dicta in *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1), which might suggest that he has such a right. But that question really does not arise in the present appeal, because Ex. 35, the mortgage deed, clearly entitles the mortgagee to ask for possession. It may be that the rent-note executed at the time did not effectively put him in possession, but there can be no doubt that under the mortgage deed he was entitled to ask for possession by taking suitable steps. The only steps he could take to enforce this right would be to get the share of his mortgagor in the family property ascertained by partition and then claim his right of possession. That is what he has sought to do in the present suit, and I therefore cannot agree with the contention that his suit was not maintainable. Our attention has been drawn to two rulings in which lessees from coparceners were held competent to maintain suits for partition and possession and this supports the view that a mortgagee who is entitled to possession must be held to be competent to maintain such a suit: *Ramasami Chetti* v. *Alagirisami Chetti* (2) and *Muhammad Jafar Khan* v. *Mazharulhasan* (3).

It was further contended that the learned Assistant Judge should have ordered partition to be by equitable division so that the appellants who are in possession of a part of the family property by sale from defendant 6, the other coparcener, should as far as possible be able to retain the benefit of their purchase and of any improvements that they may have made after purchase. It is to be remembered that the equities of other alienees may also have to be considered, but as I read the order of the learned Assistant Judge, it appears to be intended to mean that the partition should be equitable as far as is possible in the circumstances of the case, and no change is required to be made in the terms of his order. That being so, the appeal must be dismissed with costs.

Murphy, J.—I agree.

V.S. *Appeal dismissed.*

1. (1874) 11 B H C 72.
2. (1903) 27 Mad 361=14 M L J 14.
3. (1906) 3 A L J 474=(1906) A W N 199.

A. I. R. 1933 Bombay 122

BEAUMONT, C. J. AND RANGNEKAR, J.

Tamanbhat Shankarbhat—Plaintiff—Appellant.

v.

Krishtacharya Tamanacharya and others—Defendants—Respondents.

Second Appeal No. 445 of 1929, Decided on 6th October 1932, from decision of Asst. Judge, Dharwar, in Appeal No. 103 of 1928.

Practice—Inconsistent pleas—Main issue of easement—Mere claim of ownership does not bar suit.

If the owner of a piece of land proves that for 20 years he has in fact exercised right of passing and repassing over adjoining land *nec vi nec clam nec precario* he is not debarred to establish an easement of way over such adjoining land merely because when he exercised that right he had believed that he had right of ownership in the adjoining land, which right he was unable to establish in a Court of law.

Where the only issue between the parties is the issue as to easement, the mere fact that the defendants claimed in their pleading ownership of the land does not affect the question: *A I R* 1926 *Mad* 728 (*F B*) and *A I R* 1932 *Bom* 513, *Expl.* and *Doubted*; *A I R* 1922 *Bom* 199, *Rel. on.* [P 123 C 1, 2]

G. R. Madbhavi—for Appellant.

S. B. Jathai—for Respondents.

Beaumont, C. J.—This is a second appeal from the decision of the Assistant Judge of Dharwar. The plaintiff is the owner of certain buildings including a courtyard, and the defendants are owners of buildings which adjoin that courtyard. The plaintiff proposed to build a wall along the side of the courtyard adjacent to the defendants' buildings, and the defendants objected to the creation of such wall. Accordingly the plaintiff sued to restrain the defendants from obstructing the plaintiff in building the wall in question. The defendants pleaded that the yard in question was in the joint ownership of the plaintiff and the defendants, and in the alternative they claimed a right of way over the courtyard from their premises to the road. The two main issues raised in the trial Court were: first, whether the plaintiff proved that the yard to the north of the proposed wall belonged exclusively to the plaintiff, and that issue was answered in the affirmative. The second issue was whether the defendants proved that they had acquired the right of entering through the gate 'C" in the plaintiff's map and passing through the yard by prescription, and that issue was

also answered in the affirmative. In the lower appellate Court the issues were framed a little differently, but in substance the decision of the trial Court was affirmed.

The ground on which it is suggested that the judgments of the two lower Courts were erroneous is, that the defendants having failed to establish a right of ownership in respect of this courtyard, could not be allowed to prove an easement over it. We have been referred to a good many cases on the subject, and the authorities were all discussed in a Full Bench decision of the Madras High Court in *Subba Rao* v. *Lakshmana Rao* (1), and also by Baker, J., in this Court in *Marghabhai* v. *Motibhai* (2). As I understand the decision of the Madras High Court, it comes to this: that there is no objection to a man pleading in the alternative that he is the owner of a piece of land, and that if he is not the owner, he is entitled to an easement over it. That point is clear, for pleadings in the alternative are permissible although the claims pleaded are mutually inconsistent.

But the Madras Court took the view that if the acts of user relied upon to establish an easement were in fact exercised under a claim of ownership, then they could not be held to establish the easement. That I understand to have been the view of the Madras Court, and Baker, J., took the same view in *Marghabhai's* case (2). For the purposes of this case I will assume that that view of the law is correct, but I desire to guard myself against expressing a concluded opinion upon the point, because I think it is the sort of proposition on which it is dangerous to deliver an abstract opinion.

Every case must turn on the particular evidence given in it, and I do not myself see why, if the owner of a piece of land proves that for 20 years he has in fact exercised a right of passing and repassing over adjoining land *nec vi nec clam nec precario* he should be unable to establish an easement of way over such adjoining land merely because when he exercised that right he believed that he had a right of ownership in the adjoining land, which right he was unable to establish in a Court of law. However for the purposes of this case I will assume as correct the law as found by the Madras High Court. Even on that assumption I think the appeal must fail. The first issue raised was one as to the plaintiff's title, and on that issue it would be unnecessary for the defendants to give any evidence. The second issue raised was not whether the defendants established ownership, but whether they established their right to an easement. That was the only issue raised on behalf of the defendants in both the Courts. I can see nothing to suggest that the evidence on which the lower Courts relied as sufficient to establish the defendants' claim to the easemtnt was really referable to the defendants' claim which they made in their pleadings to the ownership of the yard. That being so the case falls exactly within the decision of this Court in *Dharamdas Kaushalyadas* v. *Ranchhodji Dayabhai* (3). Shah, J., says in that case (p. 204 *of* 46 *Bom*):

"I only desire to add that in both the lower Courts the case has been tried on the footing that the plaintiffs claim by way of easement the right of way over a trip as land which, according to the defendant, forms part of his land. It is no doubt true that in the plaint the plaintiffs put forward the case of ownership over this land and generally speaking that would not be consistent with the case of their having acquired an easement over that land. But the case has been tried on the footing of an easement."

I think those observations apply here. The only issue was the issue as to easement, and the mere fact that the defendants claimed in their pleading ownership of the land does not affect the question. The appeal therefore must be dismissed with costs. Cross-objections are also dismissed with cosss,

R.K. *Appeal dismissed.*

1. A I R 1926 Mad 728=96 I C 968=49 Mad 820 (F B).
2. A I R 1932 Bom 513=139 I C 571=56 Bom 427.
3. A I R 1922 Bom 199=64 I C 517=46 Bom 200.

A. I. R. 1933 Bombay 123

BAKER AND BROOMFIELD, JJ.

Vishnu Shankar Kulkarni — Appellant.

v.

Shankar Vasudeo and *others*—Respondents.

Second Appeal No. 320 of 1928, Decided on 1st April 1932.

(a) Bombay Hereditary Offices Act (1874) — Applicability — Shet Sanadi holding is watan and Act applies.

A Shet Sanadi holding is a watan, and the ordinary law about watandars would apply to it. The occupation of the land does not represent the payment made for the office; the payment is represented by a fraction of the assessment which is not recovered from the holder: (1898) *P J* 127, *Foll.* [P 125 C 1]

(b) Landlord aud Tenant — Shet Sanadi holding—Shet Sanadi service dispensed with —Its effect is to convert such watan into raiyatwari.

Where the services are dispensed with and full assessment is levied on Shet Sanadi lands the effect is to convert them from a Shet Sanadi watan into a raiyatwari holding, and to invest the holder of the lands with the rights of an ordinary occupant entitled to it so long as he paid the survey assessment: 7 *I C* 661, *Foll.* [P 125 C 2]

Nilkant Atmaram—for Appellant.

S. B. Jathar and *R. A. Jahagirdar*—for Respondents.

Baker, J. — This appeal and S. A. No. 349 of 1929 were originally set down for argument before me sitting alone, but it was contended by the learned advocates for the respondents that an important point of law common to both appeals should be heard by a Bench, namely, whether Shet Sanadi lands are watan lands or not, and it was stated that the view taken by this Court in *Limbaji* v. *Rama* (1), that Shet Sanadi lands were hereditary, was not accepted by Government, who in a subsequent Government Resolution resolved that Shet Sanadi lands were not watan property, and that as in one of these two cases the Judge had followed *Limbaji* v. *Rama* (1) and in the other he had not, the matter should be referred to a Division Bench. The appeals have been accordingly heard by a Bench, but when the appeals came to be argued, other points have arisen, and it is not, as a matter of fact, strictly correct to say that the point regarding the nature of Sanadi lands as watan lands is sufficient for the decision of either appeal, and in S. A. No. 349 of 1929 that point does not really arise. It is better therefore to dispose of the two appeals separately.

In S. A. No. 320 the plaintiff sued for partition and possession of his 1/6th share in certain property, the last holder of which was one Balkrishna. The pedigree which is given at p. 7 of the print is very complicated, and there are a very large number of members of the family, but we are not really concerned with the intricacies of the pedigree except so far as one or two points arise. The family is a Brahman Kulkarni family, but they hold two Shet Sanadi lands. How those came into their possession is very difficult to understand, as it seems very unlikely that Brahmans and Kulkarnis would perform the duties of a Shet Sanadi, which, as everybody knows, are duties of a menial description such as taking cash to the treasury, guarding the camps of officers, holding horses, and the like. However that may be, the first Court held that the plaintiff was entitled to recover by partition 1/6th of the properties in suit including the Shet Sanadi lands, which he held to be watan.

The way in which this point arises is this. On Balkrishna's death, he was succeeded by his mother Parvati, and it is contended that the property, which was watan, would not vest in Balkrishna's mother Parvati under Act 5 of 1886, and therefore the adoption of defendant 1 would not affect the plaintiff's right to share in this property. The District Judge confirmed the decree with a slight variation, reducing the plaintiff's share from 1/6th to 1/7th on the ground that one Govind, who was a natural brother of Shankar, who is the adopted father of Balkrishna, was not a lunatic, and was not disentitled to inherit, and therefore the plaintiff's share in the property would become 1/7th and not 1/6th. I do not go into the details because the appeal has been argued only on certain points, i. e., whether the Shet Sanadi property is watan or not, and another point which has been raised is as to the lunacy of Govind. It is admitted that if Govind was not disqualified by lunacy, the share of the plaintiff would be 1/7th, and not 1/6th, and it is not necessary therefore to go into the circumstances which led to that conclusion.

As regards the question of whether Shet Sanadi land is watan property under the Watan Act or not, the matter is really concluded by authority, although Government, as the result of an inquiry held in 1900, came to the conclusion that they would not treat it as such. We have not got the materials before us on which Government based that conclusion, and we are still bound by the ruling in *Limbaji* v. *Rama* (1). The learned advocate for the appellant has argued

1. (1898) P J 127.

that in that case it was not really necessary for the Court to decide whether Shet Sanadi lands were watan or not. The whole decision however proceeds on that basis. The question in the case was whether Shet Sanadi's holdings were impartible or not, and in order to arrive at a conclusion on that point the whole question of the nature of the lands and whether they were watan lands or not were gone into at great length by the Bench before whom the case came, and in the judgment of Ranade, J., which covers several pages, it has been repeatedly stated that both in view of the earlier decisions, which are referred to, *Bhimappa* v. *Mariappa* (2) and *Purshottam Talvar* v. *Mudkangavda Shidangavda* (3), and the history of the lands, a Shet Sanadi holder is a watandar, and his interest in the land is that of a watandar. The occupation of the land does not represent the payment made for the office. This payment is represented by a fraction of the assessment, which is not recovered from the holder, and this assessment may be increased by the Collector if he deals with the watan under S. 64, Watandars Act. The decision had never been overruled, and is binding upon us, and although Government as the result of subsequent inquiries may have come to a different conclusion, their conclusion is not binding on us, and as I have already said in the present case we have not got the materials before us on which that conclusion is based. As an abstract question therefore I am of opinion that we are bound to follow the view in *Limbaji* v. *Rama* (1) that a Shet Sanadi holding is a watan, and the ordinary law about watandars would apply to it. It would follow therefore that on the death of Balkrishna, his mother Parvati, under Act 5 of 1886, would be postponed to the male watandars, and therefore the adoption of defendant 1 would not give him a claim to this property.

There is however another point in the present case, which is really of more importance, and it is this. It has been argued by the learned advocate for the appellant that in the present case the Shet Sanadi lands are no longer such, as the full assessment has been levied upon them, and the services have been dispensed with, and therefore they are no longer watan lands, even supposing they were so originally. It was stated in detail in the written statement of the defendant, that the land had become khalsa, and therefore it was now raiyatwari land, and no longer watan land. It is admitted by the other side that full assessment is levied on these lands, although it is not admitted that the services have been dispensed with. But the allegations to that effect in the written statement were never denied in the lower Court, and in view of the fact that the full assessment has been levied it would be apparent on the remarks which I quoted just now from *Limbaji* v. *Rama* (1) that the occupation of the land does not represent the payment made for the office and the payment is represented by a fraction of the assessment which is not recovered from the holder. Therefore when full assessment on these lands is levied, the remuneration for the officiator goes, and the property is no longer assigned for remuneration for the performance of the duty appertaining to a hereditary office.

Apart from this, there is no evidence that any duty of a Shet Sanadi has been performed by the Brahman Kulkarnis who are the holders of this land, and, as I have already said, ordinary experience shows that such services could not be performed. This being the case I do not think it is necessary to send the case back for a finding on an express issue on that point. As it is not necessary to send the case for a finding on the point whether the services are performed, the case would be governed by *Yellappa* v. *Marlingappa* (4), in which it is held that where the services are dispensed with and full assessment is levied on Shet Sanadi lands the effect is to convert them from a Shet Sanadi watan into a raiyatwari holding, and to invest the holder of the lands with the rights of an ordinary occupant entitled to it so long as he paid the survey assessment. The powers of the Collector or rather of Government to deal with the watan under the rules made under Act 11 of 1852 or Bombay Acts 2 and 7 of 1863 (the last two Acts are now repealed) are expressly reserved under S. 1, Hereditary Offices Act. There could be no doubt therefore as to the power of the Government to convert the lands into an

2. (1866) 3 B H C R 128.
3. (1883) 7 Bom 420.
4. (1910) 7 I C 661.

ordinary raiyatwari tenure by dispensing with the services and withdrawing the remuneration, and although it has been argued by the learned advocate for the respondent that a hereditary office may continue even when the services originally appertaining to it have ceased to be demanded, I do not think, in view of the ruling in *Yellappa* v. *Marlingappa* (4), and the definition of watan in S. 4, Watan Act, that where not only the services have been dispensed with, but also the remuneration for those services have been withdrawn, any question of the property still remaining watan property can arise. It follows therefore that on the death of Balkrishna the property called Sanadi land—there are only two lands in this case—would be inherited by his heir irrespective of the provisions of the Watan Act, and therefore the decree of the lower appellate Court must be varied by directing that these two lands should be omitted from the property in which the plaintiff has been awarded a share on partition.

Broomfield, J.—I agree, and have very little to add. As to the question whether Shet Sanadi lands are watan or not, we are bound by the decision in *Limbaji's* case (1), and with respect I see no reason to differ from that decision, the Government Resolutions to the contrary notwithstanding. But the real question is not, as the lower Courts appear to have thought, whether the decision in *Limbaji's* case (1) or the Government Resolution should be followed, but whether these particular Shet Sanadi lands, assuming that they were originally watan, retained that character at the material time, that is to say, when the succession opened. The Hereditary Offices Act is subject to Act 11 of 1852, and rules have been made under the latter Act whereby it is provided that watans of this kind may be determined by Government. These rules have been referred to in Phadnis' Hereditary Offices Act, Edn. 4, at p. 277, and also in *Yellappa* v. *Marlingappa* (4). The effect of the rules is that lands which were originally watan may be converted into ordinary raiyatwari lands by the levy of the full assessment. On the pleadings and the admitted facts in this case, I agree with my learned brother that it is permissible to assume that that has been done in this case, as it was held to have been done in *Yellappa* v. *Marlingappa* (4). I therefore agree with the order which my learned brother proposes to make.

V.S. *Decree varied.*

** A. I. R. 1933 Bombay 126

PATKAR AND MURPHY, JJ.

Bayava Shiddappa Desai—Plaintiff—Appellant.

v.

Parvateva Basavaneppa Bellad—Defendant—Respondent.

First Appeal No. 448 of 1927, Decided on 11th August 1932, from decision of Joint First Class Sub-Judge, Belgaum, in Civil Suit No. 197 of 1925.

** **(a) Hindu Law, Widow — In previous proceeding *T* challenged as not being widow of *B*—*T* declared not to be widow of *B*—As effect of such declaration property does not vest in *T* and she cannot represent estate within meaning of Civil P. C. (1908), S. 11, Expl. 6.**

Where in a case *T* is not sued as the widow of *B* and it is alleged that she is not the widow of *B*, but is a pretender, and the Court decides that *T* is not the widow of *B* then *T* cannot be said to have inherited the estate of *B* neither can it be said that she represented that estate as his widow and nor that the estate vested in her, nor that she not only represented herself in that suit but also represented the interest of all the reversioners either within the meaning of the *Shivaganga case* or under S. 11, Expl. 6, Civil P. C. : 9 *M I A* 539 (*P C*), *Dist.* [P 128 C 2]

Where therefore the daughter claims as the heir not of *T* but as the heir of *B* and does not claim through *T* and if *T* is held not to represent the estate in the previous suit, the daughter is not in a subsequent suit bound by that decision. The judgment besides is not a judgment in rem in a matrimonial Court which would be binding under S. 41, Evidence Act, but is a judgment inter partes : *Case law discussed.* [P 129 C 1]

(b) Evidence Act (1872), Ss. 33, 32 (5) and 35—Inquiry in revenue proceeding to ascertain heir of *B* — Depositions in such inquiry are not admissible under Ss. 33, 32 (5) or 35 in subsequent suit.

Where after the death of *B* a revenue inquiry was directed to the ascertainment of the person who would be entitled to be placed in revenue records as the heir of the deceased khatedar *B* and wherein *T* was challenged as not being the "udki" wife of *B*:

Held : that the depositions in those proceedings were not admissible in a subsequent suit under S. 33 as they were not judicial proceedings, that the depositions could not be said to be entries in any public or official book, register or record made by a public servant in the discharge of his official duty, hence not admissible under S. 35 and that S. 32, sub-S. (5), did not apply as the statements were made after the question in dispute was raised. [P 130 C 1]

(c) Hindu Law—Daughter—Theory of being in existence at time of conception applies to daughter.

The theory of the plaintiff being in existence at the time of conception can equally be extended to a daughter and the plaintiff, if she is the legitimate daughter though posthumous, is entitled to succeed. [P 130 C 2]

(d) Hindu Law—Inheritance — Unmarried daughter.

When the inheritance opens the unmarried daughter is preferred to the married daughter. [P 130 C 2]

H. C. Coyajee and *B. D. Belvi*—for Appellant.

G. N. Thakor, *G. S. Mulgaonkar* and *D. R. Manerikar*—for Respondent.

Patkar, J.—In this case the plaintiff sued to recover possession of the property in suit on the ground that it belonged to the plaintiff's father Bhojappa bin Shivbasappa, who died in May 1905 leaving a widow Tengava who remarried in 1912 and died in 1916, and that the plaintiff was born two months after Bhojappa's death in July 1905 and was the preferable heir as the unmarried daughter of Bhojappa. The learned Subordinate Judge held that Tengava, the plaintiff's mother, was the "udki" wife of Bhojappa, and in that case the plaintiff would be the sole heir of Bhojappa, but held that the decree in Suit No. 229 of 1906 obtained by defendant 1, the daughter of Bhojappa, by another wife who had predeceased Bhojappa, operated as res judicata, as in that suit Tengava's "udki" marriage was held not proved.

Bhojappa was adopted by Shivbasappa of Hirehattiholi and had two natural brothers Irappa and Baslingappa who lived at Gajapati. The plaintiff's case is that her mother Tengava was married to Bhojappa in the "udki" form two or three years before his death at the village of Gajapati. After the marriage Bhojappa died in May 1905 leaving his adoptive mother Balava, his wife by "udki" marriage Tengava alias Savantreva who was pregnant, and a daughter Parvateva, defendant 1, born of his first wife and married to Baswanappa a year before Bhojappa Shivbasappa's death. The plaintiff was born on 25th July 1905. Ex. 63 is a copy of the birth register in which the father's name is given as Bhojappa Shivbasappa. After Bhojappa's death an heirship inquiry was held and various persons were examined including Tengava, Ex. 66, the adoptive mother Balava, Ex. 93, Irappa, the natural brother of Bhojappa, Ex. 94, and another brother Baslingappa, Ex. 95. The Assistant Collector ordered in September 1905 that Tengava's name should be entered as heir. In June 1906 the Collector reversed the order in favour of one Basvantappa, the son of Baslingappa, the natural brother of Bhojappa, who was alleged to have been adopted by Bhojappa shortly before his death. In 1906, Suit No. 229 was brought by defendant 1, then a minor by her husband as the next friend, against Basvantappa, the adopted son, and Tengava, the mother of the plaintiff. In that suit Tengava was examined in May and July 1907: see Ex. 67. On 4th July Tengava made an application, Ex. 103, and another application, Ex. 72, for adjournment for engaging a pleader. It appears that Tengava did not examine any witnesses who were personally present at her remarriage, and in August 1907 the decision, Ex. 71, was given in Suit No. 229 of 1906, holding that Basvantappa was not the adopted son of Bhojappa and Tengava was not the "udki" wife of Bhojappa. The present suit was brought by the plaintiff within three years after her attaining majority.

The first question therefore arising in this appeal is whether the decision in Suit No. 229 of 1906 operates as res judicata. The learned Subordinate Judge held that the plaintiff's mother Tengava represented the estate of her husband and the plaintiff was bound by the decision in that suit. The plaintiff claims the property in her own right as the daughter of her father, and though she is born from her mother Tengava she does not claim through her. The suit would not therefore be barred by the principle of res judicata embodied in S. 11, Civil P. C. It has been held that S. 11, Civil P. C., is not exhaustive. In *Katama Natchiar* v. *Raja of Shivagunga* (1), it was held by the Privy Council that a decree in a suit by *A* against *B*, claiming as widow, to succeed to her husband's estate, in preference to *B*, his nephew, on the ground of the family being divided, was held not to operate as res judicata, or capable of being pleaded in bar to a suit by *C*, a daughter, claiming to succeed to her father's estate on *A's* death, on the ground that the property was self-acquired by her father, and

1. (1863) 9 M I A 539 (P C).

that such judgment though viewed otherwise by the Court below determined only an issue raised concerning a particular person, and was not a judgment in rem, but simply a judgment inter partes. At page 604 it was observed as follows :

"The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow ; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

The *Shivagunga* case (1) has been followed and interpreted in several decisions of the different High Courts and by their Lordships of the Privy Council in subsequent decisions. A decree against a widow would be binding against the reversioner if the suit was brought against the widow representing the estate and the decree was fairly and properly obtained. On behalf of the appellant reliance is placed on the decisions of this Court in *Subbi* v. *Ramkrishnabhatta* (2) and *Bai Kanku* v. *Bai Jadav* (3). It was held in *Subbi's* case (2) that the rule in *Shivagunga* case (1) would not apply to cases in which suits either conducted or defended by a widow are personal to herself and originate in her own acts, and therefore a widow in the enjoyment of a life-estate can never fully represent the estate within the meaning of the dicta in the *Shivagunga* case (1) in any litigation arising out of acts of her own, and therefore it was held in that case that the plaintiff, the daughter, who claimed as reversioner to the father, was not bound by any decision in the previous suit to which the plaintiff's mother was a party. It was further held that a litigation by the widow in enjoyment of a life-estate, whether she be plaintiff or defendant, will not represent the estate fully so as to give rise to a bar of res judicata against reversioners, if such litigation is qualified and personal to the widow or has arisen out of acts of her own affecting the estate during her own life-estate therein. In *Bai Kanku's* case (3) it was held that the suit was not barred by res judicata as the decree was given against the widow on a ground personal to herself, and therefore there was no fair trial of the right of the reversioner. It was held by Hayward, J., at p. 884 (*of* 43 *Bom.*) :

"It would seem therefore that if there should be no real trial of the rights of the reversioners, it would be unnecessary to establish fraud to exclude the trial from the rule in the *Shivagunga* case (1). If there should be a real trial of the rights of the reversioners, the effect would of course be nullified by proof of fraud. But there must be a real trial of the rights of the reversioners and there must also be freedom from fraud in order to provoke the rule in the *Shivaganga* case (1)."

It appears that these cases do not precisely decide the point arising in this appeal as to whether Tengava in a case like the present represented the estate. It is however necessary for the application of the rule in the *Shivagunga* case (1) that the widow must represent the estate and there must be a trial of the rights of the reversioners and the decree must be fairly and properly obtained. In the present case Tengava was not sued as the widow of Bhojappa and it was alleged that she was not the widow of Bhojappa but was a pretender, and the Court decided that Tengava was not the widow of Bhojappa. In these circumstances it is difficult to say that Tengava inherited the estate of Bhojappa and represented that estate as his widow and that the estate was vested in her, and that she was not only representing herself in that suit but also represented the interest of all the reversioners either within the meaning of *Shivagunga* case (1), or under S. 11, Expl. 6, Civil P. C. In *Vaithialinga Mudaliar* v. *Srirangath Anni* (4) it was held that a widow, notwithstanding the personal estoppel under which she laboured, represented the estate on a question of fact according to the decision in *Chaudhri Risal Singh* v. *Balwant Singh* (5). It was however held that the principle of law to be applied in such cases was correctly summarized by Banerji, J. (p. 178 *of* 45 *I. A.*) :

"Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir."

This view of the law has been accepted in *Munni Bibi* v. *Tirloki Nath* (6), where it was held that S. 11, Civil P. C., was not exhaustive, but where the estate

2. A I R 1917 Bom 11=43 I C 233=42 Bom 69.
3. A I R 1919 Bom 146=53 I C 161=43 Bom 869.
4. A I R 1925 P C 249=92 I C 85=52 I A 322 =48 Mad 883 (P C).
5. A I R 1918 P C 87=48 I C 553=45 I A 168 =40 All 593 (P C).
6. A I R 1931 P C 114=132 I C 598=58 I A 158=53 All 103 (P C).

of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir. The question therefore arising for decision is whether Tengava in the previous suit represented the estate of the deceased Bhojappa, or in other words, whether the estate of the deceased Bhojappa had vested in the female heir Tengava. It was contended in the previous suit that she was not the heir of Bhojappa as she was not the "udki" wife of Bhojappa. Defendant 1, who was the plaintiff in that suit, denied her representative character, and though Tengeva claimed the representative character it was not recognized by the decree, and it is difficult to hold that such a decree which did not recognize Tengava as the heir of Bhojappa or as representing the estate is binding on the plaintiff, the reversionary heir. It is contended on behalf of the respondent that Tengava claimed to be the widow of Bhojappa in the previous suit and it was held that she was not the "udki" wife of Bhojappa, and the plaintiff who is born from Tengava is bound by the previous decision which denied the very basis of the plaintiff's claim in the present suit. The plaintiff, if she is the legitimate daughter of Bhojappa, claims as the heir not of Tengava but as the heir of Bhojappa and does not claim through Tengava, and if Tengava was held not to represent the estate in the previous suit, the plaintiff, the daughter, is not, in my opinion, bound by that decision. The judgment, besides, is not a judgment in rem in a matrimonial Court which would be binding under S. 41, Evidence Act, but is a judgment inter partes, that is, between defendant 1 as plaintiff and Tengava as defendant.

In *Kanhya Lall* v. *Radha Churn* (7) it was held by the Full Bench that a decision by a Court that a Hindu family is joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in any particular family or upon any other question of the same nature in a suit inter partes, is not a judgment in rem or binding upon a stranger (i. e. persons neither parties to the suit nor privies), and the decree in such a case is not admissible as evidence at all against strangers. In *Jogendro Deb Roy* v. *Funindro Deb Roy* (8) where a previous suit involved issues of legitimacy and the validity of a particular form of marriage of one of the members of the family, and another suit was brought by another member of the family, who was not a party to the former suit, against the party in possession, which raised substantially the same issue of legitimacy and a further question of priority to succeed by reason of the superior nature of the marriage of which the plaintiff was the issue, it was held that the decree in the former suit was not a judgment in rem but was a judgment inter partes, and it was observed at p. 376 that unless the previous suit could be held binding on the members of the family on account of its representative character, the previous suit would be merely a suit for possession by a party claiming to have a preferable right to the party in possession and having failed to establish that case by proving the illegitimacy of the other party. I think therefore that the previous decision does not operate as res judicata.

The next question therefore arising in the case is whether the plaintiff is the legitimate daughter of Bhojappa; in other words, whether Tengava was married to Bhojappa in the "udki" form of marriage. The learned Subordinate Judge on the evidence came to the conclusion that Tengava's "udki" marriage was held proved and that the plaintiff was a legitimate daughter of Bhojappa. The plaintiff has examined as witnesses Balkrishna Jivaji, Ex. 82, Sidramaya Adiveya, Exhibit 83, and Balkrishna Narsappa, Ex. 91, and also relied on Exs. 66 and 93 to 102, the statements made by Tengava and other witnesses in the heirship inquiry held soon after the death of Bhojappa. Objection is taken on behalf of the respondent to the admissibility of Exhibits 66 and 93 to 102 on the ground that they had no right or opportunity of cross-examining the witnesses. Shivappa, Ex. 104, who was engaged to conduct the proceedings in the heirship inquiry as mukhtyar on behalf of the defendant, stated that the witnesses were called without any notice to him by the mamlatdar and were examined behind

7. (1867) 7 W R 333=B L R Sup. Vol. 662 (F B).

8. (1871) 14 M I A 367=2 Suth 517=17 W R 104=11 Beng L R 244=3 Sar 32 (P C).

his back. On the other hand, it is contended on behalf of the appellant that Tengava's statement, Ex. 66, shows,that she was subjected to cross-examination. The learned Judge was not prepared to believe Shivappa without corroboration. The revenue inquiry after Bhojappa's death appears to have been conducted under the old S. 71, Land Revenue Code, Bombay Act 5 of 1879, and was directed to the ascertainment of the person who would be entitled to be placed in revenue Records as the heir of the deceased Khatedar Bhojappa. It was, in my opinion, an administrative or executive proceeding and not a judicial proceeding within the meaning of S. 33, Evidence Act, and that defendant 1 had no right to cross-examine the witnesses though she may have an opportunity of doing so. Further, it appears that the proceeding was not between the same parties or their representatives in interest. The proceeding was between defendant 1, the adopted son, and Tengava; and the present plaintiff is not the representative in interest of Tengava. If the plaintiffs were considered as the representatives of Tengava, the previous decision in Suit No. 229 of 1906 would bind her by virtue of the principle of res judicata, but I have held that the decision is not binding because she does not claim through her mother. It is clear therefore that the depositions taken in that proceeding are not admissible in evidence under S. 33, Evidence Act.

The appellant's counsel attempted to bring them under S. 35, Evidence Act, but the depositions cannot be said to be entries in any public or official book, register or record made by a public servant in the discharge of his official duty. It is not contended that the depositions, Exs. 66 and 93 to 102, would be admissible under any other provision of the Evidence Act. S. 32, sub-S. (5), Evidence Act, does not apply as the statements were made after the question in dispute was raised. I think therefore that the depositions in the previous proceedings are inadmissible in evidence as substantive evidence relating to the question of the udki marriage of Tengava. They might be used as corroborating or contradicting the witnesses who have been examined in this case. The learned Subordinate Judge however used those depositions as substantive evidence in the case, and for reasons stated above they must be excluded from consideration. (After considering the evidence his Lordship held that Tengava was married to Bhojappa, and the plaintiff was the legitimate daughter of Bhojappa and proceeded). It is contended for the first time on behalf of the respondent that the plaintiff was not born at the death of Bhojappa and that the estate vested in defendant 1 as the daughter of Bhojappa and the theory of the plaintiff being in existence at the time of conception cannot be extended to a daughter as it applies to a son who takes inheritance by birth. This point was not raised in the lower Court and the point is not sought to be supported by any authority. In *Juttendromohun Tagore* v. *Ganendromohun Tagore* (9), it was held that by Hindu law, as a general principle, a person capable of taking under gift or will must either in fact or in contemplation of law be in existence at the time when the gift takes effect, i. e., in the case of a will, at the death of the testator; and in the latter term are included children in embryo and children subsequently adopted. The plaintiff is the legitimate daughter of Bhojappa, though posthumous, and is, I think, entitled to succeed. It appears from the judgment of the lower Court that if the plaintiff is the legitimate daughter of Bhojappa, it was not disputed that she would be the sole heir of Bhojappa probably on the ground that when the inheritance opened, she was entitled to preference over defendant 1, who was a married daughter of Bhojappa. The unmarried daughter is preferred to the married daughter: see Mitakshara Ch. 2, S. 2, pl. 1 to 4, Gharpure's translation, p. 246, and Mayukha, Ch 4, S. 8, pl. 11 and 12, Gharpure's Translation, p. 110, and *Jamnabai* v. *Khimji Vullubdass* (10). I think therefore that the plaintiff is entitled to succeed to the property left by Bhojappa as the legitimate daughter of Bhojappa born of Tengava who was married to Bhojappa by the udki form of marriage.

I would therefore reverse the decree of the lower Court, and allow the plaintiff's claim for possession and mesne

9. (1872) I A Sup Vol 47=9 Beng L R 337=18 W R 359=2 Suth 692=3 Sar 82 (P C).
10. (1889) 14 Bom 1.

profits with costs throughout. It is found by the lower Court that defendant 1 did not prove the alleged improvements and no objections were urged before us on that point. The lower Court also assessed mesne profits at the rate of Rs. 400 per year. This point was also not contested before us. The plaintiff is therefore entitled to recover possession of the property in suit with mesne profits for three years before suit at the rate of Rs. 400 and also mesne profits at the same rate from the date of the institution of the suit till delivery of possession or till the expiration of three years whichever event happens earlier.

Murphy, J.—In this matter the plaintiff claims to inherit from her father in preference to her step-sister, a daughter who was married at the time of the father's death ; and the contentions against her have been that she is not her father's legitimate daughter, and that the issue is now res judicata by reason of the decision on the same point in a previous suit, between her mother and her step-sister, and a man who alleged that he had been adopted by her father. It appears that the father Bhojappa had acquired the property in suit by his adoption into another family. He had two natural brothers. On his death in 1905, the estate was claimed by a son of one of his brothers on the basis of an alleged adoption ; by the widow in the ordinary way ; and by his elder daughter, his only other surviving child. There were heirship inquiry proceedings under the old S. 71 of the Land Revenue Code, since repealed. The mamlatdar took many statements and the Assistant Collector decided in favour of the widow. In the end his decision was reversed by the Collector, who held in favour of the alleged adopted son. On this the elder daughter sued both the widow and the adopted son, and it was held that the plaintiff's mother had not been married to the plaintiff's father, and that there had been no adoption. The married daughter therefore inherited.

Tengava, the plaintiffs mother, seems to have had a varied career. She was first married to one Nanasaheb by whom she had a daughter. Nanasaheb however divorced her, why is not certain, and the child was abandoned to a "math," and seems to have been adopted by some kindly person. Tengava next is alleged to have married Bhojappa in the "udki" or second marriage form, and to have lived with him till his death. The plaintiff was born shortly after her father's death. Then followed the revenue proceedings I have already mentioned and the civil suit, and finally Tengava married a third husband and has since died. She is described as having been "simple," though allegations have also been made against her chastity, and it was alleged that she was no more than Bhojappa's kept mistress. There is no doubt that the plaintiff, if she is her father's legitimate child, is the proper heir, provided there is no legal obstacle to her claim. The one here set up is the earlier decision in civil suit No. 229 of 1906. The plaintiff was not a party to that suit, and if it is a real hindrance to her now, it can only be on the ground that her mother then represented Bhojappa's estate, so as to preclude the reversioner's right to it. But it seems to me that so to "represent the estate" really means to do some act in connexion with it, purporting to be done or at least implying that it was done as owner, here as that by the widow of the last male owner. But what happened was that Tengava claimed the estate against her two rivals, the alleged adopted son and the elder daughter, and failed to establish her claim. The rule is, that to constitute res judicata, the widow must represent the estate so that there is trial of the rights of the reversioners and a decree fairly and properly obtained. Where the estate of a deceased Hindu has been vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heirs: *Munni Bibi* v. *Tirloki Nath* (6). For the reason already given, that Tengava in the former suit was a defending trespasser claiming the estate, and not doing anything to represent it, in circumstances similar to those contemplated in the ruling I have quoted and others to be found in my learned brother's judgment, which I need not quote again, I think that the former suit between her mother and her step sister is no bar to the plaintiff's present suit. (The rest of the judgment is not material to this report.)

V.S.

Appeal allowed.

A. I. R. 1933 Bombay 132

BEAUMONT, C. J. AND RANGNEKAR, J.

Saundatti Yellama Municipality—Plaintiff—Appellant.

v.

Shripadbhat Seshbhat Joshi and *others*—Defendants—Respondents.

Second Appeal No. 193 of 1930, Decided on 5th October 1932, from decision of Dist. Judge, Belgaum, in Appeal No. 414 of 1928.

(a) Bombay District Municipalities Act (3 of 1901), Ss. 81 (a) and 59 (x) — Municipality cannot lease out levy of tax on pilgrims under S. 59 (x).

No doubt the word "tax" in S. 59 (x) is used in the sense of a toll, that is a payment charged for a particular benefit, namely, the right to attend a shrine. But in construing S. 81-A, which gives the Municipality power to lease the levy of any toll, the Court must apply the dictionary which the legislature has provided and hold that the section confers on the Municipality power to lease the levy of what is described in the Act as a toll, whether correctly so described or not, and as this particular levy on pilgrims is described not as a toll, but as a tax, the Municipality has not the power to farm out the levy of this imposition on pilgrims which is described as a "tax" though it might have been more correctly described as a toll. [P 132 2; P 133 C 1]

(b) Corporation—Powers of.

The Corporation cannot by estoppel acquire a power to do something which is outside its legal capacity. [P 133 C 1]

(c) Contract Act (1872), S. 24 —Part of consideration unlawful.

Where a part of the consideration is unlawful then general rule is, that when you cannot sever the illegal from the legal part of a contract the contract is altogether void. [P 134 C 1]

(d) Interpretation of Statutes—Opinion of legal remembrancer is irrelevant.

Per *Rangnekar, J.*—The opinion of the legal remembrancer, even if it is his duty to construe it or to execute or apply the statute is not relevant in case where the construction of the statute is the only question. [P 135 C 1]

H. B. Gumaste—for Appellant.

D. R. Manerikar—for Respondents.

Beaumont, C.J.—This is an appeal from a decision of the District Judge of Belgaum, who confirmed the decision of the Subordinate Judge of Bail-Hongal. The plaintiff-Municipality sued defendant 1 (with defendants 2 and 3 as sureties) for the balance of a sum of Rs. 1,076-13-0 which he had to pay under a contract in the form of a lease dated 20th March 1926 (Ex. 16), by which the Mnnicipality let to the defendant for the sum of Rs. 4,500 the right of recovering jakat from 15th March 1926, until 6th October 1926, from all pilgrims to Shree Yellamma Devi, vehicles and animals. Then in the contract the rates to be charged on persons, vehicles and animals are specified. The first charge is on every person above five years of age one anna and the other charges are on animals and vehicles. The defendant paid part of the consideration, but he has not paid the last instalment for which the Municipality now sue.

The defence of the defendant is that it was beyond the power of the Municipality to grant him the right to collect fees from pilgrims attending this shrine. That question turns on the construction of the Bombay District Municipal Act. Under S. 59 the Municipality may impose for the purposes of this Act any of the following taxes. Then sub-Cl. (iii) includes a toll on vehicles and animals entering the district, but not liable to taxation under the preceding clause, and sub-Cl. (x) includes a tax on pilgrims resorting periodically to a shrine within the limits of the municipal district. So that sub-Cl. (iii) mentions a toll, and sub-Cl. (x) mentions a tax. Then S. 81-A provides that it shall be lawful for the Municipality to lease the levy of any toll that may be imposed under this Act by public auction or private contract. Under the definition Cl. 3, sub-Cl. (xiv) it is provided that tax shall include any toll, rate, cess, fee or other impost leviable under this Act. That is not properly speaking a definition of "tax;" it is only a statement that where the context so admits "tax" is used in a comprehensive sense as including a variety of charges. In S. 59, to which I have already referred, in the phrase "the Municipality may impose any of the following 'taxes.' I think "taxes" is used in the comprehensive sense referred to in the definition, and includes various imposts. But when you come to sub-Cl. (x) under which the Municipality may charge a tax on pilgrims resorting periodically to a shrine, it is clear that the word "tax" is not used in the comprehenstve sense. It cannot there include a rate or a cess, which would be inappropriate words with which to describe a levy on pilgrims. The word "tax" there seems to me to be used in the sense of a toll, that is to say, a payment charged for a particular benefit, namely, the right to attend a shrine. But in my opinion, in construing S. 81-A, which gives the Municipality power to lease the levy of

any toll, we must apply the dictionary which the legislature has provided and hold that, the section confers on the Municipality power to lease the levy of what is described in the Act as a toll, whether correctly so described or not. Undoubtedly, this particular levy on pilgrims is described not as a toll, but as a tax. On the whole therefore I think that the view of the lower Courts was right, and that the Municipality had not the power to farm out the levy of this imposition on pilgrims which is described as a "tax," though I think it might have been more correctly described as a "toll."

Mr. Gumaste on behalf of the appellant has argued that apart from S. 81-A the contract can be justified under S. 40 of the Act. But I think the subject-matter of this lease does not fall under S. 40, which gives a Municipality power to lease any moveable or immovable property which may have become vested in it. This levy had not become vested in the Municipality at the date of the contract. Nor do I think that the agreement can be upheld on the principle of estoppel, the case of the defendant being that the contract is ultra vires the corporation. The corporation cannot by estoppel acquire a power to do something which is outside its legal capacity. It is, I think, clear that, if such a case had been raised, the defendant, having had the advantage of this contract, would have to account to the Municipality for any benefit he derived under it under S. 65, Contract Act. No such claim was raised in either of the lower Courts, and the evidence appears to show that the defendant in fact made a loss out of the contract. That indeed was admitted by the Municipality's own witness. On the face of that admission, although no doubt accounts have not been taken, I think that it would be wrong to remand the case and direct an issue to be tried as to whether the defendant made any profit under S. 65, Contract Act. For these reasons I think the judgments of the lower Courts were right and that the appeal must be dismissed with costs.

Rangnekar, J.—The facts of the case which has given rise to this appeal have been set out in the judgment of my Lord the Chief Justice, and it is not necessary for me to refer to them in detail. The Saundatti Municipality had levied a "tax" on the pilgrims visiting the shrine of Yellamma at Saundatti in the District of Belgaum and a "toll" on the vehicles used by the pilgrims. The "toll" and the "tax" were levied under the powers conferred upon the Municipality by S. 59, sub-Cls. (iii) and (x) respectively of the Bombay District Municipal Act 3 of 1901. The right to collect the toll and the tax was farmed out by the Municipality under the contract in question to the defendant for Rs. 4,500. Of this sum a large part has been paid and the suit is in respect of the balance. The defendant contended that the contract was ultra vires the Municipality. Both the lower Courts have accepted the contention, and hence this appeal. The only question on the appeal therefore is whether the contract was ultra vires the Municipality. The answer to the question depends on a true construction of S. 59, Bombay District Municipal Act, read with some other relevant sections of the Act.

Section 59 gives the Municipality, subject to any orders which the Governor in Council may make, power to impose for the purposes of the Act, certain taxes. Taxes which can thus be imposed are set out in the section itself, and looking at the description of the taxes one thing is clear that S. 59 refers to various kinds of imposts, using in each case a word or a name to signify the appropriate impost. Thus, we have in the section, a rate, a tax, a toll, an octroi on animals and goods, a cess, and so on. It is clear from the section that the word "tax" used in the body of the section is used in a general or comprehensive sense, and this is in accordance with the meaning given in the interpretation section. S. 3, sub-Cl. (xiv), runs as follows: " 'Tax' shall include any toll, rate, cess, fee or other impost leviable under this Act." It is clear that this is not a definition of the term "tax." The word "includes" in interpretation clauses is intended to be enumerative, not exhaustive.

Now, a charge of the kind described in sub-Cl. (x) would be more aptly described as a "toll" rather than a "tax." Mr. Gumaste therefore says that when the legislature has used the word "tax" in sub-Cl. (x), S. 59 it is a mistake, and that we should substitute for it the word "toll." I am unable to accept the contention, having regard to the fact that various kinds of imposts are differently

described in S. 59, and the word "tax" in the body is used in a comprehensive sense. I find there are many indications in the Act itself in which particular kinds of imposts are described as "taxes" and certain others described as "tolls." Then, the Act was amended in 1930, and the amendment refers to this particular kind of tax on pilgrims, and even in the amended section the legislature has adhered to the term "pilgrim tax" and made no change in the wording of the tax on pilgrims in S. 59. Therefore although I think that properly speaking a tax on pilgrims is a toll, I do not think it is open to us to ignore the language used by the legislature in the statute and to hold that the "tax" on the pilgrims referred to in sub-Cl. (x) is a "toll."

Section 81-A gives the Municipality the power to lease a right to levy tolls which may be imposed by the Municipality under this Act. It follows from this section that the Municipality has no power to lease a right to levy any "tax" or any other kind of impost other than a toll, for it is clear law that the powers of a corporation created by statute are limited by the statute itself, and what a corporation is not expressly authorized to do, it must be taken to have been impliedly prohibited by the statute. Therefore the contract, so far as it gave the defendant the right to collect the "tax" on pilgrims, was ultra vires the Municipality. Part of the consideration was therefore unlawful. Then the general rule is, that when you cannot sever the illegal from the legal part of a contract, the contract is altogether void: *Kristodhone Ghose* v. *Brojo Gobindo Roy* (1). Here it is conceded and it is obvious, that there was one single consideration for two objects, and the part that was legal—that is one relating to collection of tolls—cannot be severed from the illegal. That being so, the whole contract was void under S. 24, Contract Act. Mr. Gumaste refers to S. 40 of the Act. I do not think the taxes to be imposed under S. 59 of the Act are "property moveable and immovable" within the meaning of that section. Therefore I think the learned Judge was right in holding that the contract in the suit which included the right to levy tolls on vehicles coming to this shrine and a right to levy tax on pilgrims visiting this shrine was ultra vires the Municipality.

Mr. Gumaste next argued that the defendant was estopped from raising this contention. I do not think the argument is sound. The principle of estoppel by conduct applies to corporations, but subject to this, that if the act done was in itself ultra vires the corporation no conduct of the body can have the effect of estopping it from setting up its want of capacity to do the act. There is a clear distinction between the doing of an act which is permitted by the Act but which is not done in any of the modes indicated by the statute and the doing of an act which is prohibited by it, and when a contract such as this is, as I have held it is, ultra vires, in my opinion the rule of estoppel cannot be relied upon in order to validate that which was forbidden by the statute. The next point taken by Mr. Gumaste is that in any case he is entitled to the benefit of S. 65, Contract Act, and he relies on a decision of the Privy Council in *Harnath Kuar* v. *Indar Bahadur Singh* (2). This position is not challenged by the learned counsel for the respondent; he has fairly conceded that it was open to the Municipality to rely on the principle of that section, but he argues, and in my opinion rightly, that the plaintiff never put forward any such case and never sought any issue as to whether the defendant was not bound to restore the advantage which he had received under the agreement which under the statute was void. I do not think therefore it would be proper to allow Mr. Gumaste to raise this case for the first time at this stage. Apart from this there is a fatal answer to the argument. The record shows that it was admitted by the plaintiff that the defendant did not make any profit in this transaction; on the other hand he had suffered a loss. Further, when the defendant asserted that he had suffered a loss of Rs. 2,500, there was no cross-examination on the point. In this state of things, even if I was inclined to grant a remand, I do not think any useful purpose would be served by doing so.

Finally, there is one more point to which I would like to refer. On the

1. (1897) 24 Cal 895=1 C W N 442.

2. A I R 1922 P C 403=71 I C 629=50 I A 69 =45 All 179 (P C).

question of construction of S. 59 Mr. Gumaste wanted to rely on and refer to the opinion of the legal remembrancer, which, he said, was in his favour. He relied on a decision of the Calcutta High Court in *Mathura Mohan Saha* v. *Ram Kumar Saha* (3), in which it was held that it was open to the Court in construing a statute to consider the interpretation put upon it by those whose duty it was to construe, execute and apply the statute. The learned Judges in support of this proposition referred to a previous decision of theirs in *Baleshwar Bagarti* v. *Bhagirathi Dass* (4). On looking into that case, I find that two cases which seem to be American cases were relied upon as an authority for the proposition. It is not necessary for me to examine this view closely, but, with great respect to the learned Judges, I am unable to agree that the opinion of the legal remembrancer, even assuming it was his duty to construe it or to execute or apply the statute, is relevant in a case where the construction of the statute is the only question. I think the opinion of the legal remembrancer in this case was irrelevant and should not have been admitted. For these reasons I agree that the appeal must be dismissed with costs.

R.K. *Appeal dismissed.*

3. (1916) 43 Cal 790=35 I C 305.
4. (1908) 35 Cal 701=12 C W N 657=7 C L J 563.

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PATKAR AND MURPHY, JJ.

Bhagirathibai Bhalchandra Narayan —Plaintiff—Appellant.

v.

Dwarkabai Shankar Baji and *another* —Defendants—Respondents.

Second Appeal No. 663 of 1929, Decided on 30th July 1932, against decision of Dist. Judge, Thana, in Appeal No. 95 of 1926.

Hindu Law — Maintenance— Daughter-in-law —Self-acquired property of father-in-law.

A daughter-in-law is entitled to maintenance out of the ancestral property and also the self-acquired property of her father-in-law inherited by his heirs, but not out of the self-acquired property of the father-in-law disposed of by him by way of gift. And it is immaterial if the donee under the gift is the next heir : 2 *Bom* 573 (*F B*); 7 *Bom* 127; 23 *Bom* 608 and 25 *Bom* 263, *Foll.* [P 136 C 2]

J. R. Gharpure—for Appellant.

Patkar, J.—This is a suit by the daughter-in-law against the donees of the father-in-law of his self-acquired property. The finding of both the lower Courts is that when the husband of the plaintiff died the income of the ancestral property was Rs. 10 a year. Subsequently the father migrated from his native village Nivendi in Ratnagiri to the Thana District and acquired immovable property. The learned Subordinate Judge dismissed the plaintiff's suit. On appeal the learned District Judge held that the plaintiff was entitled to maintenance out of the ancestral Nivendi property and also certain property which though self-acquired was not the subject-matter of the gift by the father-in-law, but was inherited by the plaintiff's sisters-in-law.

We have heard a learned and interesting argument from Mr. Gharpure on behalf of the appellant who has relied on certain texts appearing in Ch. 12 relating to resumption of gifts in Mitakshara on verses 175 and 176 of Yagnyavalkya, Gharpure's Translation, pp. 312 and 313, Mayukha, Chap. 9, placitum 4, Gharpure's Translation, p. 168, and Texts of Narada, Chap. 13, verses 4, 5 and 6. It is urged that the donees of the self-acquired property of the father-in-law are liable to pay maintenance to the plaintiff out of such self-acquired property and that the texts were not considered in the previous decisions of this Court, and reference is made to Gholapachandra Sircar's Hindu Law, Edn. 6, pp. 605 and 606. It would have been necessary to go into the texts and consider whether they are preceptive or mandatory and support the contention on behalf of the appellant if the question were res integra, but we think that we are bound by the decisions of this Court in the case of *Savitribai* v. *Luxmibai* (1), *Kalu* v. *Kashibai* (2), *Yamunabai* v. *Manubai* (3) and *Bai Parvati* v. *Tarwadi Dolatram* (4). In the Full Bench case of *Savitribai* v. *Luxmibai* (1) it was held that a Hindu widow is not entitled to maintenance from her husband's relatives whether they are separated or unseparated from him at the time of his death if they have not any ancestral estate or

1. (1878) 2 Bom 573 (FB).
2. (1882) 7 Bom 127.
3. (1899) 23 Bom 608=1 Bom L R 95.
4. (1900) 25 Bom 263=2 Bom L R 894.

estates belonging to him in their hands. At pp. 610 and 611 the texts of Mitakshara, Chap. 9, placitams 2 to 5, which prohibited the alienation of property until maintenance of the family was provided for, and the texts of Smriti Chandrika and Narada, were referred to and considered.

In *Kalu* v. *Kashibai* (2), it was held that a daughter-in-law has no legal right to be supported by the father-in-law who had no ancestral property notwithstanding that she was in indigent circumstances. It was held that when Hindu juristis speak of rights of females of the family (other than a wife or mother) to maintenance without reference to the existence of family property

> "their tone is preceptive and the injunctions they contain are rather of ethical than of legal obligation."

In *Yamunabai* v. *Manubai* (3) it was observed by Ranade, J., that the principle that a son's widow has no legal claim for maintenance against the self-acquired property in the hands of her father-in-law has been affirmed in a series of decisions, but it was held that when such property devolves upon his heirs the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father. The moral obligation of the father is converted into a legal obligation when his self-acquired property devolves upon his heirs. *Savitribai's* case (1) was distinguished on the ground that there was separation in that case between the widow's husband and the defendants, and it was suggested that where there was no separation, it would be straining the texts too far to hold them to be preceptive only. In *Bai Parvati* v. *Tarwadi Dolatram* (4) it was held that a widow of a predeceased unseparated son has no right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property. Reference was made to Ranade, J.'s observation at p. 611 in *Yamunabai's* case (3) that if the heir were a testamentary devisee the incidence of self-acquisition would protect such property in his hands, and it was held that according to the Full Bench decision in *Savitribai's* case (2) the widow of an unseparated son could not claim maintenance as a legal right from the self-acquired property of her father-in-law in his hands, and if so, a testamentary disposition of such property would not attach to it any legal obligation in the hands of a devisee any more than a gift inter vivos would attach thereto such legal obligation in the hands of the donee. No distinction can be drawn between a bequest and a gift. If a legatee from the father-in-law of his self-acquired property is not bound to maintain the daughter-in-law, equally a donee of the father-in-law of such property cannot be held bound to maintain his daughter-in-law. It appears from *Bai Parvati's* case (4) that the legatee was the next heir. The fact that the donees in this case are the next heirs is immaterial. We think that we are bound by the decisions of this Court and are therefore unable to accede to the contentions urged on behalf of the appellant. It follows therefore that the plaintiff daughter-in-law is entitled to maintenance out of the ancestral property and also the self-acquired property of the father-in-law inherited by the sisters-in-law, but not out of the self-acquired property of the father-in-law disposed of by him by way of gift. The result is that the decree of the lower appellate Court must be confirmed and the appeal must be dismissed.

Murphy, J.—This appeal is against the decree in a suit for maintenance by a Hindu widow out of property in the hands of her father-in-law's donees. The findings of fact were that the father-in-law inherited ancestral property yielding about Rs. 10 a year. By teaching and working as a priest and clerk, he in the course of 20 years or so acquired some other property. This he gifted away before he died. For the greater part, it has been held that the nucleus of the ancestral property had not contributed to the self-acquisition and maintenance at Rs. 10 per annum was charged on the ancestral property and a portion of the self-acquired property which had been omitted from the deed of gift. The widow has appealed.

It seems to me that the first appeal Court's decree is correct. The rulings of this Court in previous cases, though not exactly on parallel facts, are contained in *Kalu* v. *Kashibai* (2), *Yamunabai* v. *Manubai* (3) and *Bai Parvati* v. *Tarwadi Dolatram* (4). Mr. Gharpure, the learned advocate for the appellant,

has based his argument on the Sanskrit texts in the original authorities. But since the law on the point has been decided since 1897 to be that a Hindu owning self-acquired property can dispose of it in his lifetime by a will and has no more than a moral obligation to support his daughter-in-law, we cannot reconsider the matter as a Division Bench.

K.S. *Appeal dismissed.*

* * A. I. R. 1933 Bombay 137

PATKAR AND MURPHY, JJ.

Basappa Dandappa Patil and *others* —Defendants.

v.

Gurlingawa Shivashankreppa Patil—Plaintiff.

First Appeals Nos. 423 and 424 of 1927 Decided on 18th August 1932 against decision of First Class, Sub-Judge, Bijapur, in C. S. No. 196 of 1925.

*** * Hindu Law—Adoption—Dwyamushyayana form—Inheritance to adoptee—Natural and adoptive mothers inherit equally as co-heiresses.**

On the death of an unmarried Dwyamushyayana adopted son, his natural and adoptive mothers inherit to his property equally as co-heiresses. *Law on Dwyamushyayana form of adoption reviewed.* [P 140 C 1; P 141 C 1]

G. N. Thakor and *H. B. Gumaste*—for Defendants.

M. R. Jayakar, *G. R. Madbhavi* and *P. S. Joshi*—for Plaintiff.

Patkar, J.—These appeals raise a novel and important and at the same time a difficult question of Hindu law which has not been covered by authority. Shivlingappa, the father-in-law of the plaintiff, Basappa, defendant 1, and Shiddappa, father of defendant 2, were brothers and had separated long ago. The property in suit consists of the property which came to the share of Shivlingappa and which was acquired by him with the income of the property that came to him by partition. Shivlingappa died in 1921 and was succeeded by his son Shivshankreppa who died in 1922. The property was inherited by the plaintiff, the widow of Shivashankreppa and the daughter-in-law of Shivlingappa. In 1923 the plaintiff adopted Shidlingappa, the son of defendant 1, in dwyamushyayana form. Shidlingappa, after his adoption, died unmarried soon afterwards. The plaintiff therefore has brought the suit as heir of her deceased adopted son. Defendant 5 is the natural mother of Shidlingappa and the wife of defendant 1. The question involved in this appeal is whether the plaintiff, the adoptive mother, or defendant 5, the natural mother, is the preferential heir, or whether they are co-heiresses and jointly inherit the property of the deceased Shidlingappa.

It is contended by Mr. Thakor on behalf of the natural mother that she is the preferential heir on the theory of propinquity based on the sapinda relationship on account of possession of particles of the same body, and reliance is placed on the decisions in the cases of *Lulloobhoy Bappoobhoy* v. *Cassibai* (1), *Buddha Singh* v. *Laltu Singh* (2) and *Behari Lal* v. *Shib Lal* (3). It is further urged that according to the theory of offering oblations, in the case of a dwyamushyayana adoption the descendant in the fourth degree need not offer oblations and priority is given to sires of natural mother, and this circumstance provides an adequate ground of preference for excluding the adoptive mother. On the other hand, it is contended by Mr. Jayakar on behalf of the adoptive mother that the dwyamushyayana form of adoption makes the adopted son the son of two fathers and also the son of two mothers, and that after the adoption the filial relation is created, by virtue of the adoption, with the adoptive father and also with the adoptive mother, but the adoptive mother is entitled to preference as the property belongs to the adoptive family. The term dwyamushyayana is applicable to an adopted son retaining his filial relation to his natural father with his acquired relation to his adoptive parents when there is a mutual agreement between the natural father and the adoptive father that the adopted son shall be the son of both. The son so adopted is technically called dwyamushyayana. see Dattaka Chandrika, S. 2, pl. 24 and 40, and Vyavahara Mayukha, Ch. 4, S. 5, pl. 21. The dwyamushyayana son, i. e., Kshetraja son mentioned by Vijnyaneshvara in Mitakshara, Ch. 1, S. 10, paras. 1 to 3, is obsolete.

1. (1880) 5 Bom 110=7 I A 212=4 Sar 164 (P C).
2. A I R 1915 PC 70=30 I C 529=42 I A 208=37 All 604 (PC).
3. (1904) 26 All 472=1 A L J 137.

The dwyamushyayana adopted son is of two kinds: (1) absolute, i. e., nitya dwyamushyayana, and (2) incomplete, i. e., anitya dwyamushyayana. The absolute dwyamushyayana son is one who is given in adoption with this stipulation. "This is the son of us two (the natural father and the adopter)," the incomplete dwyamushyayana son is one who is initiated by the natural father in the ceremonies ending with tonsure and by the adoptive father in the ceremonies commencing with the investiture of the sacred thread. As he is initiated in the gotras (family names) of both the natural father and the adoptive father he is considered to be the son of two fathers but incompletely. But if a child after being born is adopted so that his initiation under both gotras be wanting, he would partake only of the gotra of the adoptive father: see Dattaka Mimansa, Ch. 6, pl. 41, (Stokes' Hindu Law, p. 610). The anitya, i. e., the incomplete form of dwyamushyayana, is now obsolete, but the form of nitya dwyamushyayana adoption has been recognized in *Nilmadhub Doss* v. *Bishumber Doss* (4), *Basava* v. *Lingangauda* (5), and *Uma Deyi* v. *Gokoolanund Das* (6).

In *Nilmadhub Doss* v. *Bishumber Doss* (4) it was held that the effect by the Hindu law of an adoption in dwyamushyayana (son of two fathers) form is not to deprive the adopted son of his lineage to his natural father, or to bar him of his right of inheritance to his natural father's estate. The remark in *Uma Deyi* v. *Gokoolanund Das Mahapatra* (6) relating to a consequence different from ordinary adoption, that is, the children of the adopted son would revert to the natural family appears to refer to anitya, i. e., the incomplete, form of dwyamushyayana, which is now obsolete. In every case of nitya dwyamushyayana form of adoption, whether it be by the brother of the natural father of the adopted son or by a stranger, there must be an agreement to the effect that he shall be the son of both, and such an agreement must be proved like any other fact by the party alleging it: see *Laxmipatirao* v. *Venkatesh* (7). In the absence of any agreement to the effect that the adoption was to be in the dwyamushyayana form, it must be presumed to be an ordinary adoption: see *Huchrao Timmaji* v. *Bhimrao Gururao* (8). The power of giving and taking even an only son in adoption in the dwyamushyayana form is not confined to brothers but may also be exercised by their widows. The agreement or stipulation can therefore be entered into not only by the fathers but also by their widows: see *Krishna* v. *Paramshri* (9). The agreement therefore by the plaintiff after the death of her husband to take Shidlingappa in adoption in the dwyamushyayana form is valid.

The dwyamushyayana form of adoption is only a variety of the dattaka. As the dwyamushyayana adopted son does not lose the gotra and the right of inheritance in his natural family like an ordinary, that is, kevala (simple), adopted son, and as he inherits both in his natural family and also in his adoptive family, it will stand to reason that in the case of death of such a dwyamushyayana adopted son the inheritance can be traced in both the families. The natural mother is therefore not excluded from inheritance. It is contended on her behalf that as she is connected with the dwyamushyayana adopted son by sapinda relationship and by virtue of her possession of particles of the same body, she is entitled to preference. The right of inheritance is regulated by the theory of propinquity according to Mitakshara, but the test of offering of pinda is not excluded according to the decisions of the Privy Council in *Lulloobhoy Bappoobhoy* v. *Cassibai* (1), *Buddha Singh* v. *Laltu Singh* (2) and *Jotindra Nath Roy* v. *Nagendra Nath Roy* (10) in the last of which it was observed as follows (p. 1416 *of* 33 *B. L. R.*):

"It is, their Lordships think, a mistake to suppose that the doctrine of spritual benefit does not enter into the scheme of inheritance propounded in the Mitakshara. No doubt propinquity in blood is the primary test, but the intimate connexion between inheritance aud funeral oblations is shown by various texts of Manu (see for instance, Ch. 9, verses 136 and 142), and the Virmitrodaya brings in the conferring of spiritual benefit as the measure of propinquity

4. (1869) 13 M I A 85=12 W R 29=3 Beng L R 27=2 Suth 257=2 Sar 489 (P C).
5. (1894) 19 Bom 428.
6. (1878) 3 Cal 587=5 I A 40 (P C).
7. (1917) 41 Bom 315=38 I C 552.
8. A I R 1917 Bom 10=44 I C 851=42 Bom 277.
9. (1901) 25 Bom 537=3 Bom L R 73.
10. A I R 1931 P C 268=135 I C 637=58 I A 372=33 Bom L R 1411 (P C).

where the degree of blood relationship furnishes no certain guide."

In *Anandi* v. *Hari Suba* (11) it was held that under the Mitakshara School of Hindu law, the adoptive mother is entitled to succeed, in preference to the adoptive father to a son taken in adoption, and that the text "to the nearest sapinda the inheritance next belongs" must apply in virtue of the legal and Shastric fiction as much to an adopted son as to a natural born son, and that for religious purposes and merit the wife is identified completely with the husband and they form one body. It was therefore held that in the case of a simple adopted son, the adoptive mother is entitled to preference over the adoptive father. In *Kali Komul Mozoomdar* v. *Uma Shankar Moitra* (12) it was held that an adopted son occupies the same position in the family of the adopter as the natural born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa, and takes by inheritance from his adoptive mother's relations.

In *Radha Prosonno* v. *Ranee Moni Dassee* (13), it was held as settled law that an adopted son holds precisely the same position as a son born, as regards inheritance from the adoptive mother's relations, and the status of an adopted son, unless modified by express texts, is similar to that of a son born, as regards the performance of periodical obsequial ceremonies and inheritance. In *Dattatraya Bhimrao* v. *Gangabai* (14), it was held that an adopted son takes the place of a natural born son completely and is competent to inherit the property of his adoptive mother's ancestors. Even though the adoptive mother may have died before the adoption, the adopted son becomes the son of that mother so as to inherit as such to the relations in her father's family. It was held in *Sundaramma* v. *Venkatasubba Ayyar* (15), that there is no authority for the view that in order to become an adoptive mother she should have actively participated in the adoption by actually receiving the boy in adoption. In the present case the plaintiff took the boy in adoption in dwyamushyayana form and entered into an agreement with the natural father that the boy adopted was to be the son of both. It would therefore follow that the adoptive mother of an adopted son occupies the position of a mother. This position is supported by the text of Nanda Pandita in Dattaka Mimansa, S. 1, pl. 22 (Stokes' Hindu Law, p. 536) "in consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband."

The Dattaka Mimansa, S. 6, pl. 50, (Stokes Hindu Law, p. 612) lays down as follows :

"The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest: for, the rule regarding the paternal, is equally applicable to the maternal grandsires."

In the case of a simple adopted son the exclusive filial relation to the adoptive parents and severance from the natural family result from the very act of the gift of the boy in adoption. The question is discussed in *Bai Kesarba* v. *Shivasangji* (16) and *Laxmipatirao* v. *Venkatesh* (7). The filial relation of the adoptive father in the case of a dwyamushyayana adopted son is recognized by the Dattaka Chandrika, S. 2, pl. 34 and 36. By reason of the dwyamushyayana adoption the son is given in another family and the filial relation to the adoptive parents is created, but the ownership of the natural family is not extinguished by virtue of the agreement between the parties that he shall be the son of both, and the common relation to both fathers is established and continued. In this connexion I may refer to Dattaka Chandrika, S. 2, pl. 41 and 42 (Stokes' Hindu Law, pp. 646 & 467), where the objection that the gift of a son in dwyamushyayana form extinguishes the right of the property of the natural father is answered by the Dattaka Chandrika by the analogy of a gift by a person in water, e. g.. river which is made common or dedicated to the public on the ground that though the relinquishment extinguishes the peculiar property of the river the right of the giver is not thereby excluded and therefore the common relation to both fathers of such a given son is established. It would therefore follow that though the gift of the

11. (1909) 33 Bom 404=3 I C 743.
12 (1883) 10 Cal 232=10 I A 138 (P C).
13. (1905) 33 Cal 947=10 C W N 695=3 C L J 502 (F B).
14. A I R 1922 Bom 321=77 I C 17=46 Bom 541.
15. A I R 1926 Mad 1203=97 I C 145=49 Mad 941.
16. A I R 1932 Bom 654=56 Bom 619.

adoptive son in the dwyamushyayana form creates filial relation in the adoptive family and the adoptive mother gets all the rights of a mother, the rights of the natural mother are retained and are not extinguished.

On behalf of the natural mother reference is made to Dattaka Chandrika, S. 3, pl. 14 and 16 (Stokes' Hindu Law, pp. 649 and 650, and also translated in the judgment of the lower Court), and to Vyavahara Mayukha, Ch. 4, S. 5, pl. 27 (Stokes' Hindu Law, p. 67). It appears that where both the natural and the adoptive fathers are dead, the pinda (oblation) is to be offered first to the natural father and then to the adoptive father, and also when the Shraddha is performed, the maternal grandfather, that is the fathers of the natural mother are first designated and then those of the adoptive mother, and that after the fourth generation it is optional to invoke the adopter or not. The invocation of the maternal sires whether of the natural mother or of the adoptive mother is at the same time though the sires of the natural mother are to be called first. But these texts in my opinion offer slender ground for exclusion of the adoptive mother, for the sires of the adoptive mother are to be called and invoked at the same time as the invocation of the sires of the natural mother. If the invocation of the sires of the natural mother had been exclusively ordained, the matter would have stood on a different ground. The theory of adoption makes the adopted son by legal fiction the son of his adoptive father as a natural born son. The family therefore of the adoptive father in the case of a simple adopted son is the only family that can inherit to the adopted son. But in the case of a dwyamushyayana adopted son by reason of the stipulation between the natural father or mother and the adoptive father or mother that the adopted son shall be the son of both, the family of the natural father retains the right to inherit to the adopted son. As the dwyamushyayana adopted son is the son of two fathers, he is equally the son of two mothers, and in my view on the death of the dwyamushyayana adopted son both the mothers will succeed to the property of the dwyamushyayana adopted son.

The simple adopted son is not competent to marry within the prohibited degrees either in the natural family or in the adoptive family. The sapinda relationship therefore is recognized in both the families for the purpose of prohibition of marriage. But in the case of a dwyamushyayana adopted son the sapinda relationship is recognized in the natural family also for the purposes of inheritance on account of the stipulation that the son adopted shall be the son of both the giver and the receiver. I think therefore that the natural mother is not excluded from inheritance. She retains the right of inheritance to the dwyamushyayana adopted son. The adoptive mother has acquired the right to succeed as mother by virtue of the adoption. It is contended on behalf of the adoptive mother that she should be preferred to the natural mother on the ground that the property in suit belongs to the adoptive family, and it is contended that the property belonging to the adoptive family should not go out into another family by inheritance, and reliance is placed on Sarkar's Hindu Law of Adoption, Edn. 2, p. 383, where it is observed by way of addenda as follows :

> "The natural mother of the son adopted in the dwyamushyayana form can be his heir. But a difficult question arises when such a son dies, after inheriting property from both adoptive and natural fathers, leaving behind him his adoptive and natural mothers. It is reasonable that both the mothers should inherit the respective shares of the property inherited by the son from their respective husbands."

In *Behari Lal* v. *Shib Lal* (3) it was held that a natural mother of a Hindu adopted into another branch of his family by the nitya dwyamushyayana form of adoption does not, on account of such adoption, lose her right of succession to her son in the absence of nearer heirs. In that case the property belonging to the adoptive family was held to pass to the natural mother in preference to a bandhu, that is, the adoptive father's sister's son. Reference was made there to the Dattaka Chandrika, S. 2, pl. 19, where it is laid down that in the case of a simple adopted son the extinction of the filial relation resulted from the gift alone, but in the case of the dwyamushyayana form of adoption the gift is a qualified gift, and the dwyamushyayana adopted son does not cease to have filial relations with his natural parents. It would therefore follow that

the natural mother retains her right of inheritance to the dwyamushyayana adopted son. The argument that the adoptive mother is entitled to preference on the ground that the property belongs to the adoptive family, and if the right of the natural mother is recognized, the property would go into another family, is not valid, because if succession devolves on a daughter or a sister the property necessarily goes into another family according to the law prevalent in the Bombay Presidency, as she takes an absolute estate and would transmit the property to her heirs in another family. I think therefore that there is no valid ground for preference in favour either of the adoptive mother or the natural mother in the case of a dwyamushyayana adopted son, and they would therefore inherit to the dwyamushyayana adopted son equally as co-heiresses. This view seems to be consistent with the opinion of Mayne in his Hindu Law, Edn. 9, para. 167-A, p. 231, where it is observed in connexion with *Behari Lal's* case (3), as follows:

"It was held by the Allahabad High Court that by virtue of the special agreement the relationship of the natural mother was unaffected by the adoption, and therefore her right of succession. If she had died leaving property it follows that Raghunandan might have been her heir. If the adoptive mother had survived him apparently both mothers would have been co-heiresses."

Simultaneous or joint inheritance is not unknown to Hindu law, e. g., in the case of widows, daughters, sons born from different daughters or reversioners standing in the same degree of relationship or bandhus between whom no ground for preference can be discovered. I think therefore that the view of the lower Court that the plaintiff and defendant 5 succeed to the property jointly is correct, and both the appeals must therefore be dismissed with costs.

Murphy, J.—The question we have to decide is that of the inheritance to an adopted boy, whose affiliation was in a rare though still practised form known as dwyamushyayana. The special character of this form of adoption, of which there were once two varieties, is that by an agreement come to between the natural parents and the adopting parents to be, the boy remains a son in both his natural and his adoptive family, with similar rights, and almost though not exactly similar religious obligations, in each of his two families. The special form of adoption is here admitted, the distinction made in the case of its two possible varieties does not affect the question, and the fact that the adoption was by a widow to her husband also here makes no matter. We have had the advantage of a very careful and elaborate argument on each side of the question and the specific texts and rulings relied on have been set out in detail in my learned brother's critical examination of them in his judgment. The net result is, I think, to show that there is no text affording a solution to our specific question and no precedent which has dealt with it. In this state of the authorities the arguments have necessarily all been analogical ones and beset with the weakness of that form of logical exposition, that is, the fact that they are based on insufficient or non-crucial points of similarity or difference, and afford no ground for a firm opinion either way.

It is therefore necessary, I think, to revert to first principles. On the facts, had this adoption been in the "kevala" or ordinary form, the adopting mother would have been the next heir to her son —for an adoption confers all the rights of a son on the stranger boy adopted, and invites all the consequential rights of inheritance to him. The intention of the special form of adoption here carried out is to acquire all these rights for the boy adopted, while at the same time allowing him to retain all he had in his natural family. The logical conclusion would be that the acquisition in the adopting family, and the consequential rights of others on the adoption, including that of inheritance to him would devolve separately in each family—as in fact they must according to the course of events in each family, and consequently that on the facts here the adopting mother would be the preferential heir ; but this purely logical conclusion would not, I think, be in accordance with the doctrines of Hindu law in connexion with adoption. The fundamental doctrine is that an adoption creates a son, who, though he may be a stranger in blood, acquires by the ceremony not only the rights of an heir in the adopting family, but a religious or sacramental character, which endows him also with the spiritual qualities of a real son, so

that he can perform and as efficaciously, all the religious duties of a born son after his father's death. This being so, I think that in the special case we have to do with, the adopted son must be taken to have had, on his death, two mothers, for it is impossible in this view to differentiate between the real and the adopting one, and in that case I think both surviving mothers are equally the heirs.

I agree with the conclusion come to on somewhat different grounds by my learned brother, and think the decree challenged should be confirmed and the appeals against it dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Bombay 142

WADIA, J.

Gorakhram Sudhuram—Applicant.

v.

Pirojshah Manekji Javeri (*No.* 2)—Non-Applicant.

Original Civil Suit No. 1768 of 1929, Decided on 15th July 1932.

Costs—Taxation—Report of taxing master —Discretion of Court—Bombay High Court Original Side Rules (1930), Rule 559.

Though the Taxing Master himself cannot go against the express provision of R. 559, there is nothing to prevent him from certifying or reporting to the Court as to the special circumstances, if any, of a case and recommending that even where more than one-sixth has been taken off the bill, the solicitor should not be made to pay the costs of taxation and in some cases actually get his costs. The Court may then on perusing his report make such order as to costs of taxation as it may think fit. It may in its discretion deprive the solicitor of the costs of the taxation although less than one-sixth has been taxed off, or allow him the costs though one-sixth or more has been taxed off. And R. 559 should not interfere with the discretion of the Court in such cases: *A I R* 1925 *Bom* 355, *Ref.*; *Desirability of amendment of R.* 559, *on the line of R.* 44 *of the taxing rules of the Calcutta High Court, expressed.* [P 143 C 2]

M. C. Setalvad—for Applicant.

C. K. Daphtary and *M. P. Amin*—for Non-Applicant.

Facts.—A summons was taken out by Hiralal & Co., who originally represented defendants 1 and 2 and defendants 5 and 6 at the hearing of the suit for an order directing defendants 5 and 6 to pay them certain costs of the hearings before the taxing master on the taxation of their bill of costs as between attorney and client. The bill was lodged for taxation in the office of the taxing master on 9th February 1931. It was provisionally taxed in the office on 20th February 1931, and a warrant was issued on 21st February returnable on 6th March 1931. The bill as lodged against defendants 5 and 6 came to a little over Rs. 40,000. The taxing master disallowed about Rs. 8,900, i. e., more than one-sixth of the total amount. After the issue of the warrant defendants 5 and 6 instructed their present attorneys to attend to the taxation of the bill and accordingly defendants' present attorneys attended the taxing master and the taxation was completed some time in November 1931.

Several meetings were held before the taxing master in the course of the taxation proceedings the hearing of which lasted nearly forty hours. Out of of these nearly 34½ hours were taken up in the discussion of the question whether Hiralal & Co. were justified in briefing two separate sets of counsel, and also in attempting to prove an oral agreement set up by defendants 5 and 6 about the reduction in the payment of the refresher to Mr. Gharekhan, a junior counsel in the case, from and after 27th March 1930. Defendants 5 and 6 filed objections and a warrant for a review of the taxation was issued. The taxing master delivered judgment on 27th January 1932, which was annexed to his certificate dated 6th February 1932 and disallowed the objections. Summons was taken out by defendants 5 and 6 for review of the taxing master's taxation before the Chamber Judge, and the application for review was dismissed by Wadia, J., on 1st July 1932.

Order.—(After referring to the facts of the case as described above, his Lordship proceeded). At the hearing of the summons it was argued before me on behalf of Mesers. Hiralal & Co. that if this rule (559) was literally and strictly construed in every case, it may sometimes lead to an abuse of the process of the Court. On the other hand, counsel for defendants 5 and 6 argued that the rule was clear and specific, as it referred to "all costs whatever attending the taxation," and that there was no distinction between the provisional taxation of the bill in the office before warrant for taxation was issued, in which one-sixth of the bill was already knocked off, and the taxation by the taxing master himself. In support of his contention counsel re-

lied on R. 44 of the taxing rules of the High Court of Calcutta, the first part of which is in almost the same terms as R. 559 of the Bombay High Court Rules, but in R. 44 of the Calcutta High Court there is a proviso:

"that the taxing officer shall be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or a Judge shall upon application by the attorney whose bill of costs has been so taxed be at liberty to make any such order as such Court or Judge may think right respecting the payment of the costs of such taxation."

This proviso follows the wording of the proviso in S. 37, Solicitors Act of England, 6 and 7 Vic. c. 73, which was as follows:

"Provided also, that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or Judge shall be at liberty to make thereupon any such order as such Court or Judge may think right respecting the payment of the costs of such taxation."

It was argued that there is no such proviso in R. 559 of the Bombay High Court rules. In my opinion R. 559 is meant to penalize a solicitor against bringing in an exaggerated bill of costs against his client, so that if the bill was cut down by one-sixth, he would have to pay the costs attending the taxation including the costs of the attorney employed by the opposite side in contesting the bill. It would however really be a hardship in an exceptional case, if merely because one-sixth of the bill was disallowed, the attorney was not only not entitled to the costs of the hearings at which he succeeded in all his contentions, but was even made to pay the costs himself. In this particular case the objections raised by defendants 5 and 6 to the taxation regarding the two questions which I have mentioned before were disallowed with costs, and yet under the rule defendants 5 and 6 claim to be entitled to get the costs of the hearings which related to the subject-matter of those very grounds of objection. This creates an anomalous position under a strict enforcement of the rule. Counsel for defendants 5 and 6 referred me to *Higgins* v. *Woolcott* (1), in which Abbott, C. J., construed the words of S. 23 of 2 Geo. II as being imperative. The words of that statute provide

"that where the bill taxed is less by a sixth part than the bill delivered, the attorney is to pay the costs of the taxation,"

and in that particular case the bill was reduced on taxation by more than one-sixth. That was a case under the old statute in which there was no provision for exceptional cases. All that the section says is that if the bill taxed shall not be less by a sixth part the Court in its discretion shall charge the attorney or client in regard to the reasonableness or unreasonableness of the bill of costs. Counsel for Messrs. Hiralal & Co., referred to a judgment of Kemp, J. in *Jivanlal* v. *Bai Manchha* (2), in which the learned Judge at p. 534 (of 27 *Bom.L.R.*) observes as follows:

"Generally, it may be laid down that on the warrant to tax, the party taking the taxation must pay the costs of the proceedings on that warrant. But if the taxing master is of opinion that the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Court, i. e., the Chamber Judge, will make such order as to those costs as he thinks fit."

It was argued that this rule was applicable only to party and party taxation, but I see no reason why the same principle cannot also be, generally speaking, applied to the taxation of a bill as between attorney and client. thought. The taxing master himself may not go against the express provision of R. 559; but there is nothing to prevent him from certifying or reporting to the Court as to the special circumstances, if any, of a case and recommending that even where more than one-sixth has been taken off the bill, the solicitor should not be made to pay the costs of taxation and in some cases actually get his costs. The Court may then on perusing his report make such order as to costs of taxation as it may think fit. It may in its discretion deprive the solicitor of the costs of the taxation although less than one-sixth has been taxed off, or allow him the costs though one sixth or more has been taxed off. In other words, the Court may exercise its discretion in exceptional cases either in favour of the solicitor or in favour of the client. In my opinion R. 559 should not interfere with the discretion of the Court in those cases in which the taxing master has specially certified or reported the circumstances of the case. In this particular case there is no report, but it does

1. (1826) 5 B & C 760.

2. A I R 1925 Bom 355 = 87 I C 1043 = 27 Bom L R 532.

appear from the proceedings that the hearing before the taxing master was unnecessarily prolonged, at any rate by reason of the attempt to prove the oral agreement which had never been recorded and about which the story of defendant 5 varied from time to time. The agreement was not only untrue in fact, but was put forward and vexatiously persisted in merely to harass the solicitors. Every case must stand on its own facts and no hard and fast rule can be laid down ; but the Court ought not to allow R. 559 as it stands to be used as an instrument of oppression. I wish to add that an amendment of the rule on the line of R. 44 of the taxing rules of the High Court of Calcutta is desirable.

The order made by the taxing master will be set aside, and I order that defendants 5 and 6 do pay to Messrs. Hiralal & Co. their costs of the hearing before the taxing master from 4th July 1931, till 15th October 1931, being fourteen meetings, but not so as to allow the costs of counsel who appeared for Messrs Hiralal & Co. on such hearings. Defendants 5 and 6 will bear their own costs of those hearings, including the costs of the hearing before the taxing master on 25th March, 11th April, 17th April and 20th June 1931, respectively. Defendants 5 and 6 will also bear their own costs of all other hearings before the taxing master. I make no order as to the costs of and incidental to this application and the order made thereon.

K.S. *Order set aside.*

A. I. R. 1933 Bombay 144

BEAUMONT, C. J. AND MURPHY, J.

Emperor

v.

Dagadu Kondaji and *another*—Accused.

Criminal Ref. No. 97 of 1932, Decided on 16th November 1932, made by Addl. Session Judge, Poona.

Criminal P. C. (1898), S. 307—Verdict of jury—Difference between reference on acquittal or on conviction pointed out.

Section 307 makes no distinction between cases of acquittal and conviction. In each case High Court has to see whether there is evidence on which the jury could properly acquit or convict. In each case the verdict must have been perverse before High Court can interfere. But in dealing with the weight and volume of evidence the two cases differ, because of the presumption of innocence. Where a jury have convicted High Court has to see not merely that there is evidence of guilt, but that the evidence is strong enough to preclude any reasonable doubt in the minds of the jury as to the guilt of the accused. [P 144 C 2]

P. B. Shingne—for the Crown.

G. B. Chitale—for Accused.

Beaumont, C. J.—This is a reference by the Additional Sessions Judge of Poona under S. 307, Criminal P. C. Accused 1 was convicted by the jury by a majority of four to one of the offence of rape, and accused 2 was convicted by a similar majority of abetment of rape. References under S. 307 are more common, at any rate in this Presidency, in cases of acquittal by the jury than of conviction. Indeed I do not myself remember to have heard any previous reference in the case of a conviction. S. 307 makes no distinction between cases of acquittal and conviction, and the learned Government Pleader argues that we must deal with each case on the same footing. Just as in cases of acquittal we have only to see that there was evidence on which the jury could properly acquit, so in the case of conviction we have only to see that there was evidence on which the jury could properly convict ; in each case the verdict must have been perverse before we can interfere. As a proposition of law I think that statement is correct. But in dealing with the weight and volume of evidence the two cases differ, because of the presumption of innocence.

Where a jury have convicted, I think that we have to see not merely that there is evidence of guilt, but that the evidence is strong enough to preclude any reasonable doubt in the minds of the jury as to the guilt of the accused. Unfortunately in this case the learned Judge, whose summing up of the evidence was very fair, omitted to deal with the law, and he did not point out to the jury that, if they entertained any reasonable doubt, it was their duty to give the accused the benefit of that doubt, and to acquit. (The rest of the judgment is not material for the report.)

Murphy, J.—I agree.

R.K. *Accused acquitted.*

*** * A. I. R. 1933 Bombay 145**
Full Bench

BAKER, MURPHY AND BROOMFIELD, JJ.

Tukaram Khandu Koli—Accused.

v.

Emperor—Opposite Party.

Criminal Confirmation Case No. 23 of 1932 and Criminal Appeal No. 594 of 1932, Decided on 6th December 1932, against decision of Sess. Judge, Nasik.

* * **(a) Criminal P. C. (1898), S. 164 (3)—Recording of confession—Warning by Magistrate may appear in memo at end — Memorandum need not be in handwriting of Magistrate**—56 *Bom* 542=140 *I C* 740=*A I R* 1932 *Bom* 553, **Overruled.**

All that is required by S. 164 (3) is that, before recording the confession, the Magistrate should explain it to the accused that he is not bound to make a confession. It is not necessary that this warning should appear in writing at the commencement of the record of confession. The Code does not say that the memo. referred to in S. 164 (3) shall be in the Magistrate's own hand. It is sufficient if it is signed by him: 56 *Bom.* 542=140 *I C* 740=*A I R* 1932 *Bom* 553, **Overruled.**; *A I R* 1925 *Lah* 605, *Rel on.* [P 146 C 2; P 148 C 1]

(b) Criminal P. C. (1898), S. 164 (3) — Memorandum can be affixed to English version of confession.

Once the memorandum has been made in accordance with S. 164 (3), the mere fact that it was attached to the English memorandum of the original vernacular confession, the English memorandum also forming part of the record, is a sufficient compliance with law. [P 147 C 1]

J. G. Rele—for Accused.

P. B. Shingne—for the Crown.

Baker, J. — A preliminary point has been raised in this case that the confession of accused 1 Tukaram Khandu, is inadmissible in evidence because the provisions of the Criminal Procedure Code governing the recording of confessions have not been complied with. Three points have been raised by the learned advocate for the appellant, viz., that the memorandum which is necessary to be made under S. 164, Criminal P. C., does not show that the accused was warned before his confession was recorded that he was not bound to make a confession. The second point is that the Code requires that the memorandum under S. 164 should be in the Magistrate's own hand, whereas in the present case it is a typed form signed by the Magistrate, and the third point taken is that this memorandum is attached not to the confession of the accused in vernacular, but to the English memorandum of the substance of it made by the Magistrate. As regards the first point, under S. 164, Criminal P. C., before recording a confession a Magistrate is bound, under sub-S. (3) to explain to the person making the confession that he is not bound to make a confession, and that if he does so it may be used as evidence against him, and no Magistrate should record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, and when he records any confession, he should make a memorandum at the foot of such confession to the following effect :

> "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him, and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him."

The memorandum in its present form was substituted for the old form by S. 35, Criminal P. C., Amendment Act 18 of 1923. Before that the memorandum began with the words, "I believe that the confession was voluntarily made." Under the Code it is necessary that the Magistrate before recording the confession should warn the accused that he is not bound to make a confession. The Code does not provide for this warning being recorded otherwise than in the memorandum at the foot of the record. When the Code was amended in 1923, if the legislature had intended that this warning or explanation should be written out on the form of the confession before the accused began to confess, I cannot see any reason why it should not have stated so. But all that the Code requires is that this memorandum should appear at the foot of the record. Now, clearly there would be no object in warning the accused that he was not bound to make a confession if this warning was not given until after the confession had been made. Therefore it is to be presumed that this warning was given before the accused began to confess ; otherwise the memorandum signed by the Magistrate does not correspond with the actual facts. The presumption is that judicial and official acts are regularly performed, and, as a matter of fact, in one of the cases which have been quoted by the learned advocate for the appellant, the existence of the memorandum provided by S. 164

of the Code has been held to be prima facie evidence that the warning was given at the appropriate time, that is before the confession was recorded. In *Partap Singh* v. *Emperor* (1), it is stated *of* (p. 427 6 *Lah*:

"If, when a document is tendered in evidence at a trial purporting to be a confession of the accused, it is found to contain the memorandum required by S. 164 (3) above set out, a presumption arises under S. 80, Evidence Act, that all the necessary formalities purporting to have been performed have in fact been performed, and the document is admissible in evidence without further proof."

The memorandum of the confession in English is in the form prescribed by the High Court under the Criminal Circulars, and sub-S. (3) refers to the accused being asked if he is disposed to make a confession of his own free will. He has replied, "Yes." He was given to understand that the evidence may be used against him, and in spite of that he was willing to give the confession. The memorandum provided by S. 164 appears at the foot of the English record. It begins by saying : "I have explained to Tukaram Khandu Gadhavi that he is not bound to make a confession." The requirements of the law are therefore complied with, and in the absence of anything to the contrary, I do not see why it should be assumed that no warning was given to the accused before the confession was recorded. The learned advocate for the appellant has referred to a recent case of this Court, *Emperor* v. *Housabai* (2), in which a Bench of this Court had come to a somewhat different conclusion. The head-note to that case says :

"A failure by a Magistrate to convey the caution, required by S. 164 (3), Criminal P. C. 1898, to a confessing accused, that he is not bound to make a confession and that if he does so it may be used as evidence against him, invalidates the confession and renders it inadmissible in evidence against the accused. Such a failure cannot be cured under S. 533 of the Code."

In that case, which was somewhat similar to the present case, it is stated at p. 1243 (of 34 *Bom. L. R.*) that :

"Section 164 (3) however requires that a Magistrate shall, before recording a confession, explain to the person making it that he is not bound to make a confession, etc. That question was not put to her according to the record, and the Magistrate failed to record the warning, namely that he had explained to her that she was not bound to make a confession."

And the fact that the warning appeared in the certificate appended at the end of the confession, but that certificate was written out by the clerk and signed by the Magistrate, was held to invalidate the confession. With all respect, where the section distinctly lays down that all that is necessary is that the Magistrate shall append a memorandum containing inter alia a clause to the effect that he has explained to the accused that he is not bound to make a confession, and the Magistrate has in accordance with the law appended this memorandum, I am unable to understand why this should be held to be an insufficient compliance with the law. As I have already said, if the legislature at the time when this section was amended intended that this warning should be written down before the confession commences, they could have said so, and when the Magistrate has certified that he has given this caution, I do not know why it should be assumed that his statement is incorrect. With respect therefore I differ from the views expressed in this ruling, and this is sufficient for the first point.

The second point argued is that the memorandum provided by S. 164 (3) must, under the law, be in the handwriting of the Magistrate himself. There is no authority for this view except one sentence in the case just quoted, *Emperor* v. *Housabai* (2), "but that certificate was written out by the clerk and was signed by the Magistrate." It may be pointed out that where the Code requires anything to be written by the Magistrate in his own hand, it says so, and in connexion with the point we are now discussing S. 164 refers to S. 364. Under S. 364, sub-S. (3), where the Magistrate or Judge does not record the examination of the accused himself he is bound to make a memorandum thereof in the language of the Court or in English in his own hand. But the Code does not say that the memorandum referred to in S. 164 (3) shall be in the Magistrate's own hand. I am of opinion that it is a sufficient compliance with the law if the memorandum is signed by the Magistrate. It has been held in *Queen* v. *Kassimuddin* (3) that the

1. A I R 1925 Lah 605=93 I C 978=6 Lah 415.
2. A I R 1932 Bom 553=1932 Cr C 785=140 I C 740=56 Bom 542.
3. (1867) 8 W R Cr 55.

words "under his hand" mean "signed by him."

The third point which has been raised is one in which there is really no substance. It is that the memorandum or certificate referred to in S. 164 (3) must be at the foot of the record, and as by record is meant the original confession made by the accused in the vernacular, the present confession is invalidated by the fact that the certificate is gummed on to the English memorandum. There is a note in the vernacular confession that the memorandum under S. 164 (3) is appended to the English record of the confession. I do not think it is necessary to consider this point seriously. Once the memorandum has been made in accordance with S. 164 (3), the mere fact that it was attached to the English memorandum of the original vernacular confession, the Englisn memorandum also forming part of the record, is a sufficient compliance with law. It is easy to reduce such an argument to absurdity, e. g., if the memorandum were not pinned or gummed to the particulur document or if it became by accident separated from it, it might be contended that the confession would be invalidated, which seems to me unsustainable. I am therefore of opinion that the confession in question was taken in a manner which is a sufficient compliance with the law as laid down in S. 164 and S. 364, Criminal P. C., and with the High Court Circulars on the subject, and that if the case of *Emperor* v. *Housabai* (2) lays down a view different to that which we have taken, that case was not correctly decided and should be overruled.

Murphy, J.—I agree.

Broomfield, J.—The objections to the admissibility of the accused's confession have been based mainly on the decision of a Bench of this Court in *Emperor* v. *Housabai* (2). To the head-note in this case no exception can possibly be taken. It is in fact merely a paraphrase of she language of the Code. But in the course of their judgment the learned Judges who decided that case appears to have laid down the following propositions: (1) The caution required by S. 164 (3), Criminal P. C., is to be conveyed by means of questions to the confessing accused, which, with the answers, are to form part of the record of the confession, or at any rate the fact that the necessary caution has been given to the accused before recording the confession must be recited in the body of the confession itself as well as in the memorandum or certificate which is required to be made at the foot of the record. (2) The said memorandum at the foot must be written by the Magistrate in his own hand as well as signed by him. (3) A confession, though it is recorded in the form sanctioned and prescribed by the High Court and bears at the foot of it the memorandum prescribed by S. 164 (3) signed by the Magistrate, is defective and prima facie inadmissible in evidence, if it does not also comply with the first proposition aforementioned, and if the memorandum at the foot is not written out in the Magistrate's own hand.

The learned Judges in that case were not satisfied that the preliminary caution had been given, though the Magistrate had deposed on oath that he had done so. The existence of any reasonable doubt upon that point would of course invalidate the confession. We are not concerned with the question whether the confession in that case ought or ought not to have been accepted, but we are very seriously concerned with the propositions on which the judgment in *Emperor* v. *Housabai* (2) was based, since, if we must accept them as correct, the confession of the accused in the present case and in a very large number of other cases might also have to be rejected, and that, in my opinion, would lead to a grave miscarriage of justice. With the greatest deference to the learned Judges who decided that case, I hold that the propositions laid down are not warranted by the language of the Code. The Magistrate must explain to the accused before the confession is recorded that he is not bound to make it. He may ask questions on the point if he thinks his explanation is not understood, but S. 164 does not require him to ask any such questions. Nor does that section require that there should be any note at the beginning of the confession reciting the fact that the explanation has been made. It is sufficient if that fact is recorded in the memorandum which is required to be made at the foot, and I can see no reason why in an ordinary case the Magistrate's memorandum at the

foot should not be accepted as correct. If the Magistrates cannot be trusted not to sign this declaration unless it is true, they are not likely to be rendered more trustworthy by being required to make the declaration twice over. S. 164, sub-S. (2), contains a reference to S. 364, and provides that a confession shall be recorded and signed in the manner provided in the latter section. But the memorandum which is referred to in S. 364 is the memorandum of the examination of the acused, that is, the statements made by the accused.

It is that which is to be written in the Magistrate's own hand. It cannot reasonably be inferred from S. 364 that the memorandum at the foot of the confession prescribed by S. 164 (3) must also be in the Magistrate's own hand. He has only to make the memorandum and that is sufficiently done by signing it. The form of the memorandum being prescribed by the Code itself, it would surely be futile to require the Magis trate to copy the words from the book, and to make the admissibility of the confession depend upon his having done so. As regards the third point urged by Mr. Rele, independently of the judgment in *Emperor* v. *Housabai* (2), namely, that the memorandum, was appended at the foot of the English record of the confession and not at the foot of the vernacular record of it, I agree with my learned brother Baker that if this is an irregularity at all, it is a mere technicality and of no consequence. In the present case I am satisfied by the record of the confession and the Magistrate's certificate at the foot thereof that the precautions prescribed by the Code were duly taken, that the accused was warned that he was not bound to confess, and that the Magistrate satisfied himself by all reasonable and necessary means that the confession was voluntary. I hold therefore that it is admissible. (After dealing with the case on its merits, the conviction and sentence were confirmed.)

V.S. *Appeal dismissed.*

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BEAUMONT, C. J. AND MURPHY, J.

Gulabchand Hirachand Doshi—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 345 of 1932, Decided on 18th November 1932, against conviction and sentence passed by City First Class Magistrate, Sholapur.

(a) Emergency Powers Ordinance (2 of 1932), S. 4—Order made under S. 4 — Held on facts that there was no clear breach of order.

The accused was arrested under an order of the District Magistrate of Sholapur on 6th January 1932, and was sent to Bijapur Jail. On 25th February, an order was made, the general effect of which was that the accused should, within 18 hours from leaving custody, report himself to the Police Sub-Inspector at Karmala, and thereafter should not leave the limits of Karmala, and that he should not, without the permission of the District Magistrate, enter the area comprised in Sholapur Taluka excepting railway limits. That order was not served on the accused until 3rd March, but apparently its effect was communicated to him, and, on 28th February, he wrote to the Superintendent of the Bijapur Jail stating that he desired to go to Bombay to see his daughter who was ill, and requesting the Superintendent to ask the District Magistrate of Sholapur to modify the conditions in the order so as to enable the accused to go to Bombay. The request was acceded to by Government after some time and the accused was allowed to stay in Bombay till 11th March. On 10th March accused wrote a letter to the District Magistrate of Sholapur saying that he could not go to Karmala as he was not acquainted with the place and that he would be going to Sholapur direct to be present before the City Magistrate. In reply to this the District Magistrate wrote a letter saying that that order was still in force and asked him to accompany the bearer of the letter to his (District Magistrate's) bungalow. This letter was handed over to the accused at the Sholapur Railway Station and the accused went to the District Magistrate's bungalow. Some discussion took place and on the accused's refusal to obey the order to go to Karmala, he was arrested in the bungalow of the District Magistrate for breach of the order.

Held: that there was no breach of the order as the accused did not commit any offence so long as he was in the railway station and as his subsequent going to the District Magistrate's bungalow was with the permission of the District Magistrate, that the permission extended till the accused went back to the station and that there was no breach of that portion of the order which forbade him from leaving Karmala as he did not enter that place. [P 150 C 2; P 151 C 1]

(b) Emergency Powers Ordinance (2 of 1932), S. 57—Effect of S. 57.

The effect of S. 57 of the Ordinance, and the Government Notification thereunder of 5th January 1932, is to confer upon the several District Magistrates jurisdiction within their own districts: *A I R* 1933 *Bom* 1, *Rel on*. [P 150 C 1]

(c) Criminal P. C. (1898), S. 439—Conviction under S. 21, Ordinance 2 of 1932—Appeal to Sessions Judge rejected on merits—High Court is competent to hear revision application—Emergency Powers Ordinance (2 of 1932), S. 21.

The applicant was convicted under S. 21, Ordinance 2 of 1932, and sentenced to 18 month's rigorous imprisonment and Rs. 20,000 fine. His appeal to the Sessions Judge was rejected on the merits, though the fine was reduced to Rs. 12,000.

Held: that the High Court was competent to hear the revision application from the order of the Sessions Judge: *A I R* 1933 *Bom* 1, *Foll.* [P 152 C 1]

G. N. Thakor, *G. B. Chitale* and *B. G. Thakor*—for Applicant.

V. F. Taraporewala and *P. B. Shingne*—for the Crown.

Beaumont, C. J.—This is an application in revision by one Gulabchand Hirachand Doshi who was convicted on 11th April 1932, by the First Class City Magistrate of Sholapur for disobeying an order made under S. 4, Emergency Powers Ordinance, the conviction being under S. 21 of that Ordinance. He was sentenced to 18 months' rigorous imprisonment and to pay a fine of Rs. 20,000. On appeal the Additional Sessions Judge of Sholapur reduced the fine to Rs. 12,000, but otherwise dismissed the appeal. The accused was arrested under an order of the District Magistrate of Sholapur on 6th January 1932, and was sent to Bijapur Jail. On 25th February an order was made, to the terms of which I will refer more particularly presently, but the general effect of the order, so far as is material, was that the accused should, within 18 hours from leaving custody, report himself to the Police Sub-Inspector at Karmala, and thereafter should not leave the limits of Karmala, and that he should not, without the permission of the District Magistrate, enter the area comprised in Sholapur Taluka excepting railway limits. That order was not served on the accused until 3rd March, but apparently its effect was communicated to him, and on 28th February, he wrote to the Superintendent of the Bijapur Jail stating that he desired to go to Bombay to see his daughter who was ill, and requesting the Superintendent to ask the District Magistrate of Sholapur to modify the conditions in the order so as to enable the accused to go to Bombay. That request of the accused was refused by the District Magistrate on 3rd March: see Ex. 12. The accused was informed that the District Magistrate was not able to give the permission asked for, and that the matter had been referred to higher authority for orders, and that pending receipt of such orders, the District Magistrate's order under S. 4 of the Ordinance remained in force. It appears however that Government did in fact allow the accused to go to Bombay on his release from jail. He was released at 2 p. m. on 3rd March; he went to Bombay and stayed there for a week from the 4th; and the learned Public Prosecutor of Sholapur in this case on 7th April put in a purshis that the stay of accused from 4th to 11th at Bombay was condoned by Government, and as such it became legal, and therefore the prosecution did not wish to make any point out of it in this case. So that, although we have not got any order in writing from Government, the accused was allowed to stay in Bombay until 11th March. On 10th March, the accused wrote to the District Magistrate of Sholapur a letter, which is Ex. 10, in which he says:

> "The week expires tomorrow and therefore I am leaving Bombay tomorrow night by Madras Mail."

Then he says:

> "I cannot go to Karmala as I am not acquainted with the place not having been there up till now. I am therefore coming direct to Sholapur and hereby beg to inform you of the same as per assurance given by me. I expect to present myself before the City Magistrate of Sholapur at about 12 noon on Saturday."

I think that in this letter the accused says quite plainly that he does not propose to obey the order which had been made upon him to go to Karmala, and that he proposes to present himself before the City Magistrate of Sholapur which would be a plain breach of the order. In answer to that letter the District Magistrate, instead of allowing the accused to carry out his threat of breaking the order, wrote a letter, which is Ex. 7, in which he says:

> "I have received your letter of yesterday and would point out to you that my order under S. 4, Ordinance 2 is still in force and that you are required to report to the Police Sub-Inspector at Karmala and to remain there I must therefore ask you to accompany the bearer to see me immediately on the receipt of this, when I will hear any explanation that you may wish to give in the matter."

It appears from the evidence of the District Magistrate, who was called as a witness by the defence, and from other

evidence called, that that letter was sent with a Sub-Inspector of Police to the Sholapur Railway Station and was handed to the accused on his arrival; and the accused thereupon complied with the request in the letter and accompanied the Sub-Inspector to the District Magistrate's bungalow. At the bungalow a discussion took place, and it is admitted by the accused in his statement before the trial Magistrate that he was told by the District Magistrate that even then he might go to Karmala and comply with the order, and he says:

"I told him (that is, the District Magistrate) that I could not comply with that order as there was no convenience for me to stay there."

So there again the accused threatened to disobey the order, and thereupon at 8 a. m. in the morning he was arrested at the District Magistrate's bungalow. He was charged originally with having committed a breach of Cl. 6 of the order, but subsequently the charge was amended by including breaches of Cls. 5 and 7.

The first point taken by Mr. Thakor on behalf of the accused is that the order of the District Magistrate was invalid, because, he being the District Magistrate of Sholapur, had no right to make an order on a person in the District of Bijapur requiring him to come within the Sholapur District. In my opinion that point is really covered by the decision of the Special Bench of this Court in *Emperor* v. *Balkrishna Phansalkar* (1), and I only desire to say that I adhere to the view which I expressed in that case that the effect of S. 57, of the Ordinance and the Government Notification thereunder of 5th January 1932, is to confer upon the several District Magistrates jurisdiction within their own districts. But this order having been made by the District Magistrate of Sholapur, and it being an order to be carried out within the district, I do not see any objection to the order or to its having been served on the accused outside the district. The more serious point is whether the accused is proved to have committed a a breach of the order. The point most strenuously argued by the learned Advocate-General is that there was a breach of Cl. 6. Cl. 6 is in these terms:

"Shall not without the permission of the District Magistrate enter the area comprised in Sholapur taluka (excepting railway limits)."

1. A I R 1933 Bom 1=1933 Cr C 1=141 I C 720 (S B).

When the accused arrived at Sholapur station in the early morning of 12th March, he was still within railway limits, and therefore he had not at that moment committed any offence. When he went to the District Magistrate's bungalow, he did so, as it seems to me, plainly with the permission of the District Magistrate. The District Magistrate in giving evidence says that he did not give permission by which I suppose he means that he did not intend to give permission. But in fact his letter (Ex. 7) is perfectly plain. He asks the accused to accompany the bearer to see him immediately, and he admits in his evidence that it was on account of that letter that the accused went to the District Magistrate's bungalow. So that there was clear permission, and therefore the bungalow, as it seems to me, was not outside the permitted area. The learned Advocate-General has argued and argued strenuously, that, as soon as the accused in the course of the interview at the bungalow said that he did not intend to comply with the order, the District Magistrate's permission automatically came to an end. But I really have great difficulty in understanding that argument. The District Magistrate having not merely permitted, but requested, the accused to come to his bungalow for the purpose of having a discussion, it seems to me that the bungalow was on that request a permitted area— an area that is permitted to the accused, and I think it remained a permitted area throughout the conversation. Further I think that the permission would plainly extend to enable the accused to go back to the place of safety from which he had started, namely, the railway station.

If the District Magistrate had allowed the accused to carry out his original intention of going to the City Magistrate, there would have been a plain breach of Cl. 6, and if the District Magistrate had told the accused that he might leave the bungalow for the purpose of going back to the station, and the accused had not gone back to the station, there would have been again a plain breach. But it seems to me that the accused was not committing any breach of the order at the bungalow because he was there with the permission of the District Magistrate and he was not

therefore liable to be arrested. I apprehend that the District Magistrate had really forgotten about the provisions of Cl. 6 as to permission and that is probably the explanation of the trouble. The accused appears to have done his best to commit a breach of Cl. 6 and the District Magistrate, as far as I can see, has successfully frustrated his efforts. In my opinion therefore there is no offence under Cl. 6 of the order. It is then said that there is an offence under Cl. 5. Now, Cl. 5 is in these terms:

"Shall within 18 hours from leaving custody report himself to the Police Sub-Inspector, Karmala, and thereafter shall not without the permission of the Police Sub-Inspector, Karmala, leave the area comprised within the Municipal limits of Karmala."

So far as the second part of that clause is concerned, it seems to me that the accused cannot be convicted of leaving the area comprised in the municipal limits of Karmala when in fact he has never entered that area. With regard to the first part, which requires the accused to report himself to the Police Sub-Inspector, Karmala, within eighteen hours from leaving custody, there was a clear breach of that part of the order at the expiration of the eighteen hours, which was 10 a. m. on 4th March. But it seems to me that that breach was a breach once for all, and was not in the nature of a continuing breach. The Government having allowed the accused to go to Bombay on leaving custody and to stay there for a week have in my opinion, condoned the breach of Cl. 5 consisting of the accused not having reported himself within eighteen hours. The lower appellate Court was of opinion that the Government in allowing the accused to stay in Bombay for a week did not intend to cancel, and did not in fact cancel, the order. With that conclusion I agree. The Government did not, I think cancel the order, but what they did do was to condone the breach of Cl. 5 and that breach being a single breach and not a continuing breach, it appears to me that the only offence capable of being committed under the first part of Cl. 5 has been condoned and that the accused cannot therefore be convicted under that clause. Then it is said that he has committed an offence under Cl. 7. Cl. 7 is in these terms:

"Shall report himself to a police officer at his (Mr. Gulabchand Hirachand Doshi's) place of residence or lodging, Karmala, daily at the hours of 7 a. m. 12 midday and 8 p. m.."

It is of course a fact that the accused has not acquired a place of residence or lodging at Karmala and therefore it has not been possible to comply with that part of the order. But the learned Advocate-General has argued with force that the accused cannot take advantage of his own wrong. He is bound under the clause to report himself to a police officer at his, the accused's, place of residence or lodging, and I think the accused was bound under that clause to acquire with reasonable despatch a place of residence or lodging in order to put himself into a position to comply with the terms of the order. But the difficulty is that inasmuch as he was allowed by Government to be in Bombay until 11th March, and he was arrested at 8 a. m. on 12th March, the only time in which he could have reported under Cl. 7 would be 7 a. m. on 12th March, and it seems to me impossible to say that between leaving Bombay on the 11th and 7 a. m. on the 12th he ought to have acquired a residence or lodging at Karmala. That being so, I think it cannot be said that he has committed an offence under Cl. 7. The result is that, in my opinion, the accused is not shown to have committed any offence under the order and his conviction must therefore be set aside.

It was argued by Mr. Thakor that even if the conviction was legal, the trial Magistrate being a First Class Magistrate could not impose a fine of more than Rs. 1,000. It is obviously not necessary to decide that point in the view we take as to the conviction. But as the lower appellate Court has referred to a decision of the Special Bench of this Court in *Emperor* v. *Ramchandra Khaddikar* (2), and as Mr. Thakor relies on that case, I desire to say a few words about it. In delivering the judgment of the Court I merely said that the trial being by a First Class Magistrate and not by a Special Magistrate the fine of Rs. 1,500 was in excess of the sum which he was entitled to impose. No reasons for the judgment were given, and it is clear that there was no argument and no discussion. The learned Advocate-General has explained that in that case he under-

2. A I R 1933 Bom 58= 1933 Cr C 122=141 I C 574 (SB).

stood from his instructions that the First Class Magistrate who tried the case had not been given special powers under the Ordinance, and on that basis the Advocate-General admitted that the fine was beyond the jurisdiction of the Magistrate. In making our order we acted upon what the learned Advocate-General told us to be the facts. It would now appear that either the learned Advocate-General was wrongly instructed, or he mistook the meaning of his instructions, and that in fact the First Class Magistrate in that case had special powers under the Ordinance. But the case cannot be treated as an authority in any case in which the Magistrate has special powers under the Ordinance, because we clearly made our order on the basis that the facts were as we were told they were. Conviction set aside and the accused to be set at liberty. Fine, if paid, to be refunded.

Murphy, J.—The applicant has been convicted under S. 21, Ordinance No. 2 of 1932, and has been sentenced to 18 months' rigorous imprisonment and Rs. 20,000 fine. His appeal to the Sessions Judge was rejected on the merits, though the fine was reduced to Rupees 12,000, and the matter is before us in revision. A Special Bench of this Court has held in *Emperor* v. *Balkrishna Phansalkar* (1) that we are competent to hear such an application, and the facts being parallel, we are bound by its decision. Arguments have been addressed to us on several points and some of these are questions of law. The first point is that the District Magistrate's order is bad in law and void, the objection being that it is not covered by S. 4 of the Ordinance under which it was made. The point is really already concluded, for the Special Bench case I have referred to dealt with an order drawn up in almost exactly similar terms, the only difference being the name, the prescribed place of residence, and the period within which the order had to be obeyed. I think S. 4 of the Ordinance is wide enough to include the terms of this order and also that the objection that such an order could not be made because the applicant was, at the time of its making a prisoner under the orders of the District Magistrate who made it, in the prison at Bijapur, the adjoining district, is not valid.

The section contemplates the making of orders forbidding a particular person from entering the district of the District Magistrate making the order—an order to be made by implication in the absence of the person against whom it is directed and even under the ordinary law a proclaimed offender can be taken action against in his absence. Another possible view is that the order is good though it cannot take effect till the person against whom it is made enters the district ; but it is not necessary to go to this length, for a warrant of arrest can be executed outside the local limits of the Magistrate issuing it. The learned Advocate-General's argument was that under the notification the District Magistrate was vested with all the powers of the Local Government whose orders extend to the whole of the Presidency. This was my learned brother Broomfield's view on the terms of the notification in the Special Bench case. But it is not necessary to go to this length, for, apart from that argument, I think such an order can be made while the person against whom it is directed is outside the local limits of the authority making it. The argument as to the service of notice of the order is similar and such notice can I, think, by Ss. 69 and 73, Criminal P. C., be served outside the district. There is no question here that that is properly served on the applicant by the Jailor at Bijapur. The real question before us is to determine the order which has been disobeyed. The charge was for breaches of Cls. 5, 6 and 7 of the order of the District Magistrate. The first required the applicant on release from Bijapur jail to proceed to Karmala within 18 hours

The second (No. 6) required him not to enter, except within railway limits, the Sholapur taluka, without the District Magistrate's leave, and the third to report daily to the police officer at Karmala. The applicant never went to Karmala at all, and entered the limits of the Sholapur taluka on 12th March having been released on the 3rd. On the face of things there has been a breach of the order, but the circumstances have to be considered. His relations had apparently been negotiating with the District Magistrate, and admittedly on release the District Magistrate and Government allowed him to go to Bombay and to re-

main there for a week as his daughter was ill, but we do not know the terms of this suspension of the order. While in Bombay the applicant saw the Commissioner of Police and obtained some sort of countenance from him. At the expiration of the week, the applicant wrote to the District Magistrate saying he was coming to report himself to the City Magistrate, Sholapur, and arrived accordingly. Had he been allowed to do as he proposed, there would have been a clear disobedience of Cl. 6 of the order. But he was met by a Sub-Inspector of Police at the station and taken to the District Magistrate, who had sent him a letter in which it is stated that the terms of the original order still stood, but that he should go and see him. The applicant, at the interview was offered several alternatives for his residence but insisted on remaining at Sholapur though apparently he would have been willing to go to Bombay. He was then and there arrested and prosecuted. It is clear that the order to proceed to Karmala within 18 hours had been abrogated by the permission to remain in Bombay for a week, though to what extent and in what terms this suspension had been made we do not know.

It does not seem to me to be replaced by any other definite order or condition. It is clearly a suspension of the original order. That involves a change for the time being at any rate of the direction to proceed to Karmala and also to report himself three times a day to the police officer at his residence there. Since the applicant had entered the Sholapur taluka with, at any rate, the consent of the District Magistrate, it is difficult to say that his entry was without the District Magistrate's permission. It is clear that he refused to leave Sholapur city and from a plain commonsense point of view it might be held that this suffices to show contumacy and to justify his arrest and prosecution, and had he been allowed to carry out his original intention of seeing the City Magistrate or escorted back to the railway limits and then re-entered the city, his guilt would have been clear. But he was not allowed to do either of these things. This is a criminal prosecution involving heavy punishment, and where a clear and definite order is relied on as having been disobeyed, I think the prosecution must prove what the order really was and its actual transgression. On the state of the facts I cannot see any clear transgression of the letter of the order as modified by admitted concessions though no doubt its spirit was transgressed. I think that in these circumstances we must interfere with the conviction and sentence and set them both aside.

K.S. *Conviction set aside.*

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* A. I. R. 1933 Bombay 153

PATKAR AND BARLEE, JJ.

Ramchandra Shankarshet Uravane—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 376 and Criminal Review No. 260 of 1932, Decided on 12th October 1932, against order of Sess. Judge, Poona.

*** (a) Criminal P. C. (1898), S. 423 (2)—Trial by jury—Misdirection or admission of inadmissible evidence—Appeal against conviction—Power of appellate Court stated—Evidence Act (1872), S. 167.**

In a case of trial by jury the appellate Court has power in the event of misdirection or admission of inadmissible evidence either to convict or acquit the accused according as the evidence is or is not sufficient for conviction, or where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, a new trial may be ordered: *Case law reviewed.* [P 156 C 1]

*** (b) Criminal P. C. (1898), S. 439 (6)—Trial by jury—Appeal against conviction—Notice for enhancement of sentence should not be given at time of admission of appeal—If given at time of admission, accused is entitled to show on evidence that he is innocent.**

It is undesirable that a notice for enhancement of sentence should be issued at the time of the admission of the appeal. The Court must first of all deal with the appeal on the merits, and it is only after disposing of the appeal that it can consider whether notice to enhance sentence should issued: *A I R 1925 Bom 268, Ref.* [P 156 C 2]

If the notice has been issued at the time of the admission, the accused is entitled on the evidence to show that he is innocent. If the conviction is not correct on the evidence he will be entitled to an acquittal. [P 156 C 2]

*** (c) Evidence Act (1872), S. 122—Prohibition against admission of communication between husband and wife extends to all communication of whatever character.**

Under S. 122 the wife is not permitted to disclose any communication made by the husband during the marriage unless the husband who made it consents. The prohibition is based on the ground that the admission of such testimony is likely to disturb the peace of family and weaken the feeling of mutual confidence and rests

on no technicality that can be waived at will but is founded on a principle of high import which no Court is entitled to relax The prohibition is not confined to cases where the communication sought to be given out in evidence is of a strictly confidential character, but the prohibition is extended to all communications of whatever nature which pass between husband and wife: 40 *Cal* 891, *Ref.* [P 157 C 2]

S. G. Velinkar and *S. G. Patwardhan*—for Accused.

P. B. Shingne—for the Crown.

Facts.—Ramchandra the accused had two wives: Lilavati and Shantabai, and had also a mistress, Sundrabai. He was not on good terms with his senior wife Lilavati. Latterly Ramchandra grew cold towards Sundrabai, and demanded the ornaments back from her which he had given her as presents. This led to frequent disputes between them. On 17th or 18th May 1931, Sundrabai visited Ramchandra in his house, which was at Poona. They went into the bedroom of Ramchandra. Some altercation probably took place between the two, and Ramchandra killed Sundrabai with a knife. He gave the knife, which was bloodstained, to his wife Lilavati to be cleaned, which she did. He then asked her to throw it into a gutter. Lilavati saw her husband covered with blood-stains, and helped him to wash himself and to clean the stained clothes. They together washed the wall of the bed-room which was covered with blood. Some articles which bore marks of blood were heaped by Lilavati in the court-yard of the house and destroyed by fire under the directions of her husband. Sundrabai's body was tied in a carpet, and the bundle was removed by Ramchandra's father Shankarshet, with the help of his servants Chima and Sakharam, to his country house at Vadgaon Budruk, at a distance of six or seven miles from Poona. A pit was sunk in one of the rooms in the Vadgaon house and Chima and Sakharam buried the body in that pit.

Ramchandra apprehending that Lilavati might disclose the affair, confined her in a room of his Poona house. She managed to escape from the confinement early in January 1932, and on 7th January 1932, she presented an application to a Magistrate narrating what she knew of the murder of Sundrabai. When the news of the application reached Shankarshet he caused Chima to dig up the pit in the Vadgaon house, and caused his servants Sakharam and Raghunath to collect the bones and throw them into a canal near the house. The canal was dug out by the police, and the bones were recovered. At the trial of Ramchandra by a jury and a Judge, Chima and Raghunath were examined as witnesses, but the Judge warned the jury to treat them as accomplices and not to accept their evidence until it was independently corroborated. Lilavati was also examined as a witness, and her evidence was placed by the Judge on the same footing. She deposed:

"He (Ramchandra) had got a knife having blood on it and both his hands were steeped in blood up to his elbow."

She was then asked by the prosecution to depose to what Ramchandra said to her at the time. This question was objected to by the defence on the ground that it was not permitted by S. 122, Evidence Act. The learned Judge ruled as follows:

"It seems to me that having regard to the principles laid down in 40 *Cal* 891 the Public Prosecutor cannot ask the witness as to what threats the accused gave her or the reason why he gave such a threat. But it is open to him to ask her what the witness did or he could ask her questions as to why she followed a particular course of conduct, if the answers do not disclose any communication made by the accused to her which would incriminate him or establish his admission as to his guilt or his direct connexion with the alleged offence."

Lilavati was allowed to give evidence. Ramchandra was found guilty of murder, and was convicted and sentenced to transportation for life. The accused appealed to the High Court.

Patkar, J.—(After stating the facts of the case as above, the judgment proceeded). The learned counsel appearing on behalf of the accused has urged that there were misdirections and non-directions on points of capital importance to the accused which vitiated the verdict of the jury. It is contended by counsel on behalf of the appellant that as notice is given to show cause why the sentence should not be enhanced to that of death he is entitled to go into the evidence under sub-S. (6), S. 439, and that in showing cause why the sentence should not be enhanced, he is also entitled to show cause against the conviction. It is further urged that if the Court came to the conclusion that the accused was not guilty, he should be acquitted, but

if the Court was not prepared to acquit the accused, he should not be convicted if the Court came to the conclusion that there was a misdirection to the jury and the accused was entitled to a re-trial. On behalf of the Crown it was urged that there was no misdirection in the charge to the jury as the conviction was right, but, in any event, if the Court did not accept the verdict, the accused was not entitled to an acquittal, but a re-trial must be ordered. S. 439, sub-S. (6), Criminal P. C., runs as follows:

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-S. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

The question is whether in showing cause against his conviction, sub-S. (2), S. 423, Criminal P. C., would prevent the appellant from going into the evidence in the case. Sub-S. (2), S. 423 says :

"Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

Even in a jury case where the Court comes to the conclusion that there are misdirections by the Judge, S. 537 lays down that no sentence by a criminal Court shall be reversed on appeal or revision on account of any misdirection in any charge to a jury unless such misdirection has in fact occasioned a failure of justice. It will be necessary for the Court to go into the facts and the evidence in order to consider whether any verdict is erroneous or not on account of any misdirection or error of law and to determine whether the misdirection has occasioned a failure of justice. In a jury case the High Court has in several cases to go into the questions of fact and has to appreciate the evidence for itself. In cases tried by a jury on a reference by the Judge under S. 307, Criminal P. C., or in cases of confirmation of sentence of death under S. 374, Criminal P. C., and in cases falling under sub-S. (2), S. 418, Criminal P. C., the High Court can go into the facts and decide for itself whether the accused is guilty or innocent.

Under S. 167, Evidence Act:

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

In a case therefore of misdirection or admission of improper evidence the High Court can go into the facts and decide for itself whether the decision of the lower Court is right on the merits or whether the misdirection or the illegal admission of evidence has occasioned a failure of justice. In a case tried with the aid of jury, there was some difference of opinion as to the course to be followed when the Court came to the conclusion that there was a misdirection. It was held in *Wafadar Khan* v. *Empress* (1), following the decision in the case of *Makin* v. *Attorney-General for New South Wales* (2), that the appellate Court cannot go into the facts in such a case, and that it would be tantamount to substituting the decision of the appellate Court for the verdict of the jury, which had an opportunity of seeing the demeanour of the witnesses and weighing the evidence. The view is supported by the Allahabad High Court in *Emperor* v. *Ikram-ud-din* (3). But the view taken in the case of *Wafadar Khan* v. *Queen-Empress* (1) has been dissented from by this Court in *Queen-Empress* v. *Ramchandra Govind* (4), where it was held that S. 167, Evidence Act, applied to criminal trials by jury and that when part of the evidence, which has been allowed to go to the jury, is found to be irrelevant and inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record or to quash the verdict or to order a retrial, and that the law as settled in England by the decision in *The Queen* v. *Gibson* (5) and by the Privy Council in the case of *Makin* v. *Attorney General for New South Wales* (2) with reference to the granting of new trials where evidence has been improperly admitted, does not apply to India. At p. 763 it was observed as follows :

"We have then to apply the test adopted from *Queen* v. *Elahi Bax* (6), by Warden and

1. (1894) 21 Cal 955.
2. (1894) A C 57=63 L J P C 41=58 J P 148 =17 Cox C C 704=69 L T 778.
3. (1917) 39 All 348=18 Cr L J 491=39 I C 331.
4. (1895) 19 Bom 749.
5. (1887) 18 Q B D 537.
6. (1866) 5 W R Cr 80=B L R Sup Vol 459.

Sargent, JJ., in *Reg.* v. *Fattechand Vastachand* (7)—whether if the case had been tried by a Judge and assessors, the Court would set aside the verdict.''

The view of the Madras High Court in *Emperor* v. *Edward William Smither* (8) is consistent with the view of the Bombay High Court, and it was held that it was not obligatory on the High Court to order further inquiry or retrial and that the High Court could consider the evidence and if, after so doing, it formed the opinion that the evidence could not, in any proper view of the case, support a conviction, it would not alter or reverse the order of acquittal. The Calcutta High Court appears to have recently taken a view which is more in consonance with the view of the Bombay High Court rather than with the view taken in the earlier decisions of that Court. In the case of *Government of Bengal* v. *Santiram Mandal* (9), it was held that there was nothing in the language of S. 423, sub-S. (1) (a), Criminal P. C., to differentiate the way in which the powers of the appellate Court are to be exercised according as it is a jury trial or not, and that the language of the section is wide enough to enable the Court to deal with the entire case on appeal against an order of acquittal, though in a jury trial, and finally dispose of the same.

I think therefore that in a case of trial by jury the appellate Court has power in the event of any misdirection or admission of inadmissible evidence either to convict or acquit the accused according as the evidence is or is not sufficient for conviction, or where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, a new trial may be ordered as in the case of *Reg.* v. *Ramswami Mudaliar* (10). In the present case notice has been issued to show cause why the sentence should not be enhanced from transportation for life to that of death. It is undesirable that such a notice should be issued at the time of the admission of the appeal. It was held in *Emperor* v. *Mangal Naran* (11) that when a case comes to the knowledge of the High Court by an appeal having been filed, it is not desirable, if the appeal is admitted, to issue a notice at the same time on the accused, under S. 439, Criminal P. C., asking him to show cause why the sentence passed upon him should not be enhanced. It was observed by Crump, J., as follows (p. 359 of 27 *Bom. L. R.*) :

"It is likely to produce an impression on the mind of an illiterate accused in jail, that it is proposed to enhance the sentence because he has appealed. Further, my own experience is that this practice is likely to lead to an inconvenient result because it confounds two matters which should be kept separate.''

The Court must first of all deal with the appeal on the merits, and it is only after disposing of the appeal that it can consider whether notice to enhance the sentence should issue. It is observed in one of the judgments in the case of *Emperor* v. *Jorahbai* (12) that no hard and fast rule can be laid down on this point, but if the appeal of an accused person against his conviction and sentence has been dismissed and notice to enhance the sentence has been issued, the conviction is to be treated as correct when another Bench of the Court considers the application for enhancement on the merits. The District Magistrate can move the Local Government to make an application for enhancement of sentence in an appropriate case. It is therefore neither necessary nor desirable for the High Court to issue a notice for enhancement of sentence at the time of admission of the appeal. It is however open to consider the question of enhancement of sentence after the appeal has been heard. In the present case as the notice has been issued at the time of the admission, I think the appellant is entitled on the evidence to show that he is innocent. If the conviction is not correct on the evidence, the appellant will be entitled to an acquittal. If, on the other hand, the evidence is sufficient for conviction, it is not necessary for the Court to send the case for retrial even though there may be misdirection or admission of irrelevant evidence, as the Court can accept the verdict of the jury under S. 167, Evidence Act, unless the Court

7. (1868) 5 B H C R 85.
8. (1902) 26 Mad 1.
9. A I R 1930 Cal 370=1930 Cr C 634=127 I C 657=32 Cr L J 10=58 Cal 96.
10. (1869) 6 B H C R Cr 47.
11. A I R 1925 Bom 268=87 I C 424=26 Cr L J 968=49 Bom 450=27 Bom L R 355.
12. A I R 1926 Bom 555=97 I C 805=27 Cr L J 1173=50 Bom 783.

is of opinion that it is difficult to arrive at any conclusion on the evidence and that it is necessary or desirable that a retrial should be ordered. (Here his Lordship discussed the evidence and proceeded). With regard to Lilavati, it is urged that certain statements made by her in her deposition come within the prohibition laid down in S. 122, Evidence Act. It is urged on behalf of the Crown that objection was taken only to the threat which was given by the accused in order to prevent her from giving out what the husband is alleged to have done to the woman Sundrabai. The learned Judge has made a note to the following effect :

"Though it might not be permissible for a husband or wife to disclose the actual communication it is open to the husband or wife to state why he or she followed a particular course of conduct referring only to the effect produced on him or her by reason of any communication which it is not permissible to disclose because S. 122 provides against disclosure of a 'communication' and not against disclosure of effect of said communication."

With regard to the other statements as to asking Lilavati to wash the knife or to bring water or to take the gunny bag and to pour kerosene oil over it or to give back the knife and take the two bottles, one half full and other empty, they amount to communications by the accused which ought to have been excluded under S. 122. It is urged on behalf of the Crown that no objection was taken to such questions in the lower Court. On the other hand, counsel on behalf of the accused in cross-examination questioned Lilavati as to whether her husband asked her whether she had thrown the knife into the mori and whether she had told him that she had thrown it into the mori. It might be contended that such communication might have been consented to by the accused, the husband of Lilavati, as the question was asked in cross-examination on behalf of the accused. I think it would have been much better if the learned Judge had excluded any direct question as to the conversation between the accused and his wife with regard to the several statements which have appeared in her evidence, and Lilavati should have been asked merely as to what she did in consequence of what she was told by her husband instead of permitting her to state what her husband told her in consequence of which she did a particular thing or refrained from doing a particular thing. Under S. 120, Evidence Act the wife of an accused person is a competent witness.

Under S. 122 the wife is not permitted to disclose any communication made by the husband during marriage unless the husband who made it consents. The prohibition is based on the ground that the admission of such testimony is likely to disturb the peace of family and weaken the feeling of mutual confidence, and, as observed in *Nawab Howladar* v *Emperor* (13) rests on no technicality that can be waived at will but is founded on a principle of high import which no Court is entitled to relax. The prohibition is not confined to cases where the communication sought to be given out in evidence is of a strictly confidential character, but the prohibition is extended to all communications of whatever nature which pass between husband and wife. (After discussing the evidence in the case, the accused was found guilty of the murder of Sundrabai. The conviction and sentence were therefore confirmed. The sentence was not enhanced, as there was no direct evidence as to the circumstances under which the offence was committed).

Barlee, J.—The issues in this as in all murder cases are—(1) Is Sundrabai dead? and (2) Did the appellant kill her? The Sessions Judge, concurring with a majority verdict, has answered both questions in the affirmative, and we have to see whether there are any grounds for interference. Ordinarily, we would be able to interfere with the verdict of a jury only if it were shown to be erroneous owing to a misdirection by the Judge or to a misunderstanding of the law. This case is exceptional. The appellant has been called on to show cause why he should not be hanged and has had the right to show cause against his conviction. That, it seemed to us, means any cause, and we have heard the appeal on the merits. We have to decide whether the conviction is bad because of a misdirection (and this includes a material non-direction or error of law); and, also, whether on the facts the appellant is entitled to an acquittal. Nevertheless, though the appellant has two strings to his bow, the opinion of the Judge and of the majority of the jury is a very im-

13. (1913) 40 Cal 891=15 Cr L J 303.

portant factor in this case. And I shall therefore first consider the question whether the jury were misled by the charge so as to be able to estimate the value of their opinion. Two errors of law are alleged (pp. I to K). The first is that the learned Judge allowed the accused's wife to mention certain communication made to her by him. She deposed that she had met her husband and that he had ordered her to clean a knife and to burn a gunny bag and so forth. I very much doubt whether such orders, unaccompanied by any explanation or statement, can be classed as communications within the scope of S. 122, Evidence Act. In any case her statement amounted to no more than this, that in consequence of certain directions she had done certain acts, and the accused was in no way prejudiced by the form in which she put her answers.

The other complaint amounts to this that, when the Public Prosecutor refused to call Sakharam the Judge should have called him as a Court witness. Learned counsel bases his argument on the Calcutta case of *Ram Ranjan Roy* v. *Emperor* (14) where the Court stigmatized the conduct of the prosecution as unfair inasmuch as certain eye-witnesses had been kept back. The remarks cannot apply to the present case. Sakharam was a servant of the accused's family. He was called by the police, because Chima had implicated him, and he refused to make a statement. Moreover, it must have been apparent to the learned Judge from the conduct of the defence that the accused expected that he would favour the defence. In these circumstances I am of opinion that the Judge was right when he refused to call him. It would have been most unfair to give the defence an opportunity of cross-examining a favourable witness, whilst preserving the right of reply. A trial must be conducted fairly, but that means that the Court must be fair to both sides. This is a stronger case than that of *Emperor* v. *Vasudeo Gogte* (15), for the witness whom Gogate's advocate wanted the Public Prosecutor or the Court to call was not likely to favour the defence. (The remaining portion of the judgment discusses evidence which it is not necessary to report.)

K.S. *Appeal dismissed.*

14. (1915) 42 Cal 422=16 Cr L J 170=27 I C 554.

15. A I R 1932 Bom 279=1932 Cr C 591=138 I C 503=33 Cr L J 613=56 Bom 434.

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* A. I. R. 1933 Bombay 158

MURPHY AND BROOMFIELD, JJ.

Parashram Bhika and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 392 of 1932, Decided on 15th December 1932, against order of Sess. Judge, Thana.

*** (a) Criminal P. C. (1898), Ss. 209 and 253—Order of discharge should not be lightly set aside in revision—Criminal P. C. (1898), S. 437.**

An order of discharge passed by a Magistrate should not be set aside in revision except on such grounds as would justify the setting aside of an order of acquittal in appeal. That is to say, an order of discharge which is made after hearing all the evidence for the prosecution ought not to be set aside unless it can be said that the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the Court: *Case law discussed.* [P 161 C 1,2]

*** (b) Criminal P. C. (1898), Ss. 209 and 253—There is no distinction between order of discharge passed under S. 209 and that passed under S. 253.**

There is no distinction between orders of discharge passed under S. 253 and such orders passed under S. 209. The proposition that a Magistrate has a wider discretion to appreciate evidence under S. 253 than he has under S. 209 is wholly untenable. A Magistrate is both entitled and bound to value and weigh the evidence and that, if he believes the evidence and makes an order of discharge the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being, not whether the revising Court agrees with it, but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence: *Case law referred.* [P 161 C 2 ; P 162 C 1]

G. C. O'Gorman and *W. B. Pradhan*—for Petitioners.

Y. V. Dixit—for Opponent.

P. B. Shingne—for the Crown.

Broomfield, J. — This revision application is presented on behalf of two persons who have been discharged by the Magistrate, the Sessions Judge having subsequently set aside the order of discharge and having directed under S. 437, Criminal P. C., that they should be committed for trial to the Sessions Court along with three other persons on charges of dacoity, wrongful confinement and other offences. The case involves a question of principle of some importance.

The allegations of the complainant in the Magistrate's Court were that he had filed a civil suit against Jafar Ali, accused 1, and that while that suit was pending, Jaffar Alli and two other persons, accused 2 and 3, had come to his house, had overpowered him and thrown him on the ground and had robbed him of an account book, which was required in connexion with the civil suit. Accused 3 had then run away to a motor car which was waiting about sixty paces off, but the complainant pursued him and when they got to the motor car in which accused 4 and 5, two police constables who are the applicants in this revision application, were sitting, there was a struggle for the account book. Accused 4 and 5 snatched the book, tore out some pages and gave some to accused 1 and some to accused 2. After that accused 2 went away in the motor car and the complainant was arrested by accused 4 and 5 and forcibly taken to the police station. The complainant alleged, therefore, that the five accused had committed offences punishable under Ss. 395, 323, 451, 342 and 320.

The Magistrate recorded all the evidence that was offered on behalf of the prosecution and he came to the conclusion that the complainant's case as against accused 4 and 5 was not credible. He pointed out in his judgment that the complainant's story that accused 4 and 5 were sitting in the motor car was not supported except by one witness, Ex. 13, and that witness the Magistrate disbelieved, because the description he gave of what happened during the struggle for the account book at the motor car did not tally with the evidence of the complainant or the other witnesses. There were three other witnesses, Nos. 9, 10 and 11, none of whom stated that accused 4 and 5 were sitting in the motor car. Moreover the complainant and his witnesses except No. 13 stated that accused 1 was one of the persons taking part in the struggle for the book, but witness 13 said that he never saw accused 1 there at all. The learned Magistrate also pointed out that there was no evidence at all to prove the alleged conspiracy between accused 4 and 5 and the other accused. The record of the case has been placed before us and it appears to be a fact that there is not an atom of evidence of any kind to show any connexion between these two constables and the other accused, so that the alleged conspiracy could only be a matter of inference from what accused 4 and 5 did on the occasion in question. As to that as I have shown the evidence was thoroughly discrepant. The explanation which these accused gave was that they were off duty and in plain clothes at the time and were sitting in a tea shop. They saw these people struggling in the road and making a disturbance and therefore they arrested the complainant and accused 1 and took them both to the police station. After discussing the evidence at some length the Magistrate recorded findings accordingly that he was

"inclined to believe in the explanation of the accused" and that there was "no evidence of the alleged conspiracy on the part of accused 4 and 5 to help accused 1, 2 and 3."

In his view what had happened was that accused 4 and 5

"happened to be there, and seeing the disturbance of the peace on the main road, they intervened, although they were not on duty, and removed the quarrelling parties to the police station."

Accordingly he discharged them, purporting to act under S. 253, Criminal P. C., and proceeded to try the rest of the accused. There was then an application in revision to the Sessions Judge. In his order he pointed out in the first place that as the offences alleged by the complainant were some of them offences triable exclusively by the Court of Session the Magistrate's order of discharge ought to have been made under S. 209 of the Code and not under S. 253. Technically this may be so although by the time the Magistrate came to make his order he had decided that no offence triable by the Court of Session had been committed, so that the proceedings ceased to be proceedings under Ch. 18 of the Code and became the ordinary proceedings for the trial of a warrant case. But in our opinion in view of the authorities which have been cited to us and in view of the very similar language of Ss. 209 and 253, it makes no material difference whether the Magistrate's order be regarded as one made under S. 253, as it purported to be, or under S. 209. I shall refer to this point again after reviewing the authorities. The learned Sessions Judge next pointed out that the complainant and one of his witnesses,

that is Ex. 13, had definitely stated that they had seen accused 4 and 5 in the motor car, and they had not been cross-examined. Apparently the learned Judge thought that, as they had not been cross-examined, the Magistrate ought to have believed their testimony, although as I have mentioned, there were other witnesses who deposed to the same incident and did not see these accused in the motor car at all. The cross-examination of the witnesses, it should be noted, was not waived; it was merely postponed for a later opportunity. Next the learned Sessions Judge has referred to the alleged conduct of the police constables in taking the complainant through the streets of the town of Thana, without giving him an opportunity to dress himself properly. He says:

"This is not the conduct to be expected of a policeman trying to discharge his duty."

That may be so. If it was a fact that the accused were oppressive in their behaviour to the complainant, that was no doubt a breach of duty on their part. He should have been given time to arrange his dress if it was necessary, but we fail to see what that has to do with the charges of dacoity and other offences which the complainant brought against these constables. The only reason calling for serious consideration which the learned Sessions Judge has propounded for his order setting aside the Magistrate's order of discharge appears to be contained in this passage:

"Besides when police constables were involved in such a serious charge it was not at all proper for the Magistrate to take on himself the responsibility of appreciating the evidence. Properly it is a jury case and the jury should be allowed to have their say in the matter."

In these remarks the learned Judge appears to express the opinion that the Magistrate was not entitled to appreciate the evidence given in support of the complainant's case. In our opinion that is not a correct statement of the law. There is an early ruling of this High Court, *Queen-Empress* v. *Namdeo Satvaji* (1), which was at one time cited in support of the proposition which the learned Sessions Judge appears to lay down. It was held there by West, J., that a Magistrate holding a preliminary inquiry ought to commit the accused to the Court of Session when the evidence is enough to put the party on his trial and

"such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction."

But this dictum has been explained in later cases in a manner which very materially modifies the effect which it might seem at first sight to have. In *Emperor* v. *Rawji Hari* (2), Batty, J., said (p. 226):

"The question whether the District Magistrate's order directing the commitment of this case to the Sessions should be set aside depends mainly upon the construction that is to be placed on the words of S. 210, Criminal P. C. That section requires that a charge should be framed and commitment made only when the Magistrate is satisfied that there are sufficient grounds for committing. It is urged that this phrase is tantamount to the language used in *Queen-Empress* v. *Namdev Satvaji* (1) and *Emperor* v. *Varjivandas* (3), which, according to the contention for the Crown, implies that there are sufficient grounds when the facts alleged by witnesses would suffice for the conviction if those witnesses were believed. The language in both these judgments however requires that the witnesses should be credible. We think, with reference to the wording of the present Code, a Magistrate can hardly be said to be satisfied that sufficient grounds for committing are supplied by the evidence of witnesses, if he himself is unable to believe those witnesses. Before he can be so satisfied it is manifest that all grounds for discrediting them must be removed. We think that a District Magistrate is not justified in calling on a Subordinate Magistrate to commit a case unless it can be shown that if that Magistrate was not satisfied as required by S. 210, Criminal P. C., that he ought to have been satisfied; that is to say, it ought to appear that the Magistrate had no ground for discrediting the evidence adduced for the Crown, as well as that the evidence relates to facts sufficient to form the basis for a conviction."

Again in *In re Bai Parvati* (4) it was held that where a committing Magistrate finds that there is no evidence whatever or that the evidence tendered for the prosecution is totally unworthy of credit it is his duty under S. 209, Criminal P.C., to discharge the accused. Batchelor, J., in the course of his judgment said (p. 167):

"This construction commends itself to us as an accurate statement of the meaning of S. 209, Criminal P. C. Nor do we think that there is anything in it which is in real conflict with what West, J., said in the case relied upon by the respondent, *Queen-Empress* v. *Namdev Satvaji* (1). For, the operation of that decision is limited to this: that the Magistrate ought to commit when the evidence is enough to put the party on his trial and 'such a case obviously

1. (1887) 11 Bom 372.
2. (1907) 9 Bom L R 225=5Cr L J 213.
3. (1902) 27 Bom 84=4 Bom L R 779.
4. (1910) 35 Bom 163=11 Cr L J 692=8 I C 631.

arises when credible witnesses make statements which, if believed, would sustain a conviction.' It seems to us that the whole point of this passage lies in attaching due emphasis to the word 'credible,' and some confirmation of that construction of the decision may be obtained from the observations of the same learned Judge in *Dhanjibhai* v. *Pyarji* (5)."

We have been referred to other cases in which the Magistrate's discretion to appreciate the evidence and his duty to do so are explained and emphasized. *In re Bai Parvati* (4) was followed in *Emperor* v. *Bai Mahalaxmi* (6). In *In re Narainah Venkatesh* (7) the Court held that the powers conferred by S. 437, Criminal P. C., are not to be exercised promiscuously in all cases whenever the District Magistrate, who has not seen the witnesses, forms a different estimate of their value from that which was formed by the Magistrate who did see them. Batchelor, J., in the course of his judgment in that case, said (p. 351 of 19 *Bom. L. R.*):

"There is no doubt that the District Magistrate has jurisdiction to make the order for further inquiry which he has made. But it is important for us now to see whether in making that order he exercised his judicial discretion properly or improperly. For it is obviously an exceedingly serious thing that a man on the same set of facts should twice be exposed to a prosecution of so grave a character as this. The limits within which the discretion to order a further injury should ordinarily be exercised are stated in the Full Bench decision in *Queen-Empress* v. *Chotu* (8), a decision which shows that those limits are rather strictly confined."

The fact that this High Court has approved the decision of the Allahabad High Court in *Queen-Empress* v. *Chotu* (8) is important, because what the Full Bench laid down in that case amounted in effect to this: that an order of discharge should not be set aside in revision except on such grounds as would justify the setting aside of an order of acquittal in appeal. That is to say, an order of discharge which is made after hearing all the evidence for the prosecution [we are not here concerned with orders made at a previous stage under S. 209 (2) or 253 (2)] ought not to be set aside unless it can be said that the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the Court.

The learned Government Pleader who appeared to support the order of the Sessions Judge maintained that a distinction ought to be drawn between orders of discharge passed under S. 253 and such orders passed under S. 209. No such distinction appears to be recognized in the cases cited. *Emperor* v. *Rawji Hari* (2), *In re Bai Parvati* (4) and *Emperor* v. *Bai Mahalaxmi* (6) deal with orders under S. 209, whereas *In re Narainah Venkatesh* (7) and the Allahabad Full Bench case of *Queen-Empress* v. *Chotu* (8) deal with orders under S. 253. But the Courts have laid down principles which appear to apply equally to an order of discharge passed under either section. The suggestion is that a Magistrate has a wider discretion to appreciate evidence under S. 253 than he has under S. 209, that the Magistrate in this case ought to have passed his order under S. 209 and that under that section he was not entitled to weigh the evidence but ought to have committed the case to the superior Court as soon as it appeared that evidence was produced in support of the complaint. That proposition however is clearly untenable in view of the cases to which I have referred. The learned Government Pleader cited *Fattu* v. *Fattu* (9), where it was held that a Magistrate ought to commit if the question of discharge or commitment is one merely of probabilities. The Court recognized however that the Magistrate has "a wide discretion" in the matter of weighing the evidence. In the present case it cannot be said, we think, that the Magistrate has proceeded merely upon probabilities. He considered the whole of the evidence produced by the prosecution and came to the conclusion that so far as the case against accused 4 and 5 was concerned it was not worthy of belief.

Mannikka Padayachi v. *Emperor* (10) was also cited as laying down the proposition that whenever the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and weighing it, the Magistrate must commit the accused to the Sessions; but

5. (1884) Unrep Cr Case 201.
6. A I R 1915 Bom 195=31 I C 347=16 Cr L J 747.
7. (1917) 18 Cr L J 646=40 I C 394=19 Bom L R 350.
8. (1886) 9 All 52=(1886) A W N 281 (F B).
9. (1904) 26 All 564=1904 A W N 125.
10. A I R 1925 Mad 1061=90 I C 530=26 Cr L J 1570=48 Mad 874.

if the evidence be of such a nature that no reasonable person would ever on that evidence hold the accused guilty he must be discharged under S. 209. That is the judgment of a single Judge and it appears to us to go farther in limiting the discretion of the Magistrate than the decisions of this Court would warrant. The view we take is that the Magistrate is both entitled and bound to value and weigh the evidence and that, if he disbelieves the evidence and makes an order of discharge, the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being not whether the revising Court agrees with it, but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence In the present case we have gone through the evidence and have considered the orders of the Magistrate and of the Sessions Judge. We think that the case against the present applicants, accused 4 and 5, was very weak and that the Magistrate had good grounds for taking the view which he did take and refusing to accept the testimony of the complainant and some of his witnesses against these accused. I have already pointed out that, although the very foundation of the case against these accused was conspiracy, there is not really any evidence whatever to prove conspiracy between them and the other accused. We cannot therefore see anything perverse or irrational in the Magistrate's order discharging the accused. We must set aside the order passed by the Sessions Judge in revision and direct that the Magistrate's order be restored.

Murphy, J.—I agree.

V.S. *Order set aside.*

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MURPHY AND BROOMFIELD, JJ.

Ahmed Hasham — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 470 of 1932, Decided on 30th November 1932, against decision of Presidency Magistrate, Second Class, Bombay.

(a) Penal Code (1860), Ss. 109 and 114 — Distinction between S. 109 and S. 114 stated.

Section 114 applies where a criminal first abets an offence to be committed by another person, and is subsequently present at its commission. Active abetment at the time of committing the offence is covered by S. 109 and S. 114 is clearly intended for an abetment previous to the actual commission of the crime, any time, that is, before the first steps have been taken to commit it. That section cannot apply where the abetment alleged consists solely of things at the time of the commission of the offence: 27 *Cal* 566 : 42 *Cal* 422 and *A I R* 1925 *P C* 1, *Ref.* [P 162 C 2]

(b) Penal Code (1860), S. 153 — S. 153 involves some act of origination of riot by doing illegal act.

Section 153 implies instigation in the sense of causing a riot by an illegal act which originates the feelings of a so far peaceful assembly. That section involves some act of origination of a riot, by doing an illegal act infuriating to the feelings of those who ultimately come to riot and that is the connotation of the expression "gives provocation" rather than the converse one of abetment. [P 163 C 1]

Per *Broomfield, J.*—Provocation which results in rioting may or may not amount to instigation or abetment of that offence. If it does it is obviously more appropriate to charge abetment, which is the more serious offence. The fact that the offence under S. 153 is punishable with a maximum of six months imprisonment indicates that the section was intended to apply to such provocative words or acts as do not amount directly to instigation or abetment. [P 164 C 1]

G. N. Thakor and *B. G. Thakor* — for Accused.

P. B. Shingne—for the Crown.

Murphy, J.—The appellant has been convicted, firstly, under S. 153, and secondly, under Ss. 427 and 114, I. P. C., and has been sentenced to three months' rigorous imprisonment and to pay a fine of Rs. 1,000 for the first offence, and to one day's simple imprisonment and to pay a fine of Rs. 1,000 or in default three months' further rigorous imprisonment for the second offence. The facts the prosecution set out to prove are, firstly, that he provoked a riot, and secondly, that he abetted the commission of mischief by a riotous crowd, by inciting it to commit this offence. It is obvious that S. 114 is a mistake, and that it should be S. 109. S. 114 applies where a criminal first abets an offence to be committed by another person, and is subsequently present at its commission. Active abetment at the time of committing the offence is covered by S. 109 and S. 114 is clearly intended for an abetment previous to the actual commission of the crime, any time, that is, before the first steps have been taken to commit it. It is also doubtful in this case,

we think, if S. 153 applies. S. 153 is as follows :

"Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished, &c."

Although on direct inspection this section applies to the act of provoking a riot, that is giving occasion by an act or deed, which is illegal, for its occurrence, what the prosecution have relied on is an act of a different character. It was sought to prove that the appellant urged the crowd, which on arrival he found already in a riotous temper, to wreck certain Moghul restaurants, that is, he instigated it to riot, and it seems clearly a case to which S. 153, which implies instigation in the sense of causing a riot by an illegal act which originates the feelings of anger of a so far peaceful assembly, does not prima facie apply. Though the distinction may sometimes be hard to draw, the offence under S 153 involves some act of origination of a riot, by doing an illegal act infuriating to the feelings of those who ultimately come to riot ; at least some such idea is connoted by the expression "gives provocation" rather than the converse one of abetment. The offence, if any here, was, we think, one under Ss. 147 and 109, and not the one found by the learned Presidency Magistrate. Turning to the facts, we are concerned with events which took place on 31st October 1931, at about 10-30 p. m., and again at 12-30 a. m. the same night, at Bhendy Bazaar, where the Sandhurst Road and the old J. J. Hospital Road cross. According to the evidence there are several restaurants here owned by persons called "Moghuls," that is Persian Mahomedans. We are directly concerned with two of these: one called the Subhanulla Restaurant, and the second the Wazir Restaurant Though separately run, they are of the same ownership The accused lives in the building, the ground floor of which is occupied by the Wazir Restaurant.

Trouble started that evening at about 10-30 p. m. owing to the spilling of some tea, which had been ordered by a motor-driver, who was seated in his car, outside the restaurant to be served to him and his friends in the car, from the Subhanulla Restaurant. The outside waiter clumsily spilt some of it over the driver, Munshikhan, who being incensed struck the waiter. The owner of the restaurant came out, and, what is called, remonstrated with Munshikhan. Munshikhan got down from his car in a threatening manner, and the restaurant owner retreated, but another man, who appears to be a hanger-on of the restaurant owner, one Bakar, took up the quarrel, and fought with Munshikhan, who seems to have been injured, though not very seriously. and he was ultimately taken to the J. J. Hospital. On this, an onlooker, called "Cutlerywala" in the papers, brought a constable from the Maharbawdi Police Station and explanations ensued and a crowd collected. At this point it is said the accused came down from the second floor of the building to his waiting car, intervened and then incited the crowd by the words : "Lagao Saleko, I shall spend rupee one to Rs. 10,000 if necessary." The crowd dragged Bakar out of the restaurant and manhandled him, and the accused is said to have thrown a cup, which was outside the restaurant on a table, at the electric chandelier. The crowd became threatening, and the Dongri police were rung up, and after some time Sub-Inspector Hakim came there, but when he arrived everything had admittedly quieted down, though the restaurant had been damaged to some extent. Munshikhan had been sent to the hospital, and the Sub-Inspector visited him at that place and found that he was not much injured. The evidence is that many hostile persons remained standing about outside the restaurants.

At about 12-30 a. m. the accused is said to have re-appeared with his car, and trouble started again. The crowd stoned a third restaurant, known as the New Subhanulla Restaurant, and, it is said, that the accused again incited the crowd in similar terms to attack the Wazir Restaurant. It was closed by the keeper who retreated, but was also damaged by the crowd, mostly owing to the throwing of stones, before it was closed. The police presently arrived and dispersed the mob, and the trouble ended. It appears that on the same night several other Moghul restaurants were similarly attacked in the city. The owner of the Subhanulla Restaurant, Mahomed Hussein Haji's complaint was

recorded at about 8 a. m. the next morning. There is some confusion in it, for the first information report mentions another accused Abdul Rahiman, though the statement made by the complainant mentions the accused as Ahmed Shah. It appears that the former person has also been tried and convicted for rioting. The accused could not be found, and the record contains a series of telegrams, which passed between him and his relations, between Bombay and Calicut. The accused's case is that he had gone to Calicut on business, and had not absconded, as alleged by the prosecution. (After dealing with evidence, the judgment concluded.) We think that apart from the legally wrong convictions, which we have the power to set right in appeal, it would be dangerous to allow the convictions to remain, based, as they are, on such slender foundations. We therefore reverse the convictions recorded against and the sentences passed on the appellant, and direct that he be acquitted and discharged.

Broomfield, J.—I agree both on the merits and on the points of law, but desire to add certain remarks as to the latter. First, as to the application of S. 153, I. P. C., the accused in this case was really charged with instigation, or abetment, of rioting, and not provocation in the ordinary sense of that word. Technically, perhaps, the case might be brought within the scope of S. 153. In *Queen-Empress* v. *Kahanji* (1) the language used both by Jardine, J., and Ranade, J., seems to show that these learned Judges regarded instigation as equivalent to provocation, as the latter word is used in this section. But the point does not seem to have been argued in that case. Provocation which results in rioting may or may not amount to instigation or abetment of that offence. If it does, it is obviously more appropriate to charge abetment, which is the more serious offence. The fact that the offence under S. 153 is punishable with a maximum of six months' imprisonment indicates that the section was intended to apply to such provocative words, or acts, as do not amount directly to instigation or abetment. One of the defence witnesses in the case, Haji Abdulla Haji Jassim, in the course of his evidence, deposed as follows :

1. (1893) 18 Bom 758.

"A rumour then spread that an injured man had been removed to hospital and died there. This infuriated the mob. Some of them were heard to shout that the Moghuls had insulted the Muslim faith. By this I understood that the Moghuls who are Shias had insulted the Sunnis."

That affords an instance of conduct which might be provocation within the meaning of S. 153, although it would not amount to abetment of rioting. But this conduct was attributed to the mob in general and there is no suggestion that the accused himself used language of this kind. Then, as regards S. 114 of the Code, the language of the section indicates that there must be evidence of abetment, that is instigation, conspiracy or aid, independent of and prior to anything done by the accused when present at the scene of the crime. The section cannot apply where the abetment alleged consists solely of things done at the time of the commission of the offence. There is the highest authority, including a ruling of the Privy Council, for holding that this is what the legislature intended. I may refer to *Abhi Misser* v. *Lachmi Narain* (2), *Ram Ranjan Roy* v. *Emperor* (3) and the Privy Council case of *Barendra Kumar Ghosh* v. *Emperor* (4).

The matter is, I think, of some importance as this section has persistently been misapplied by the Magistrates, and in the last Criminal Session, over which I presided, a great many of the charges had to be amended by substituting S. 109 for S. 114. I agree with my learned brother that this appeal must be allowed and the convictions set aside.

Per Curiam.—The fines, if paid, to be refunded.

V.S. *Conviction set aside.*

2. (1900) 27 Cal 566=4 C W N 546.
3. (1914) 42 Cal 422=16 Cr L J 170=27 I C 554.
4. A I R 1925 P C 1=85 I C 47=26 Cr L J 431 =52 I A 40=52 Cal 197 (P C).

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PATKAR AND MURPHY, JJ.

District Local Board of Poona—Defendants—Appellants.

v.

Vishnu Raghoba Wadherkar—Plaintiff—Respondent.

Appeal No. 54 of 1931, Decided on 2nd August 1932, against order of Asst. Judge, Poona, in Appeal No. 294 of 1930.

Bombay Local Boards Act (1923), S. 136 Section has no application to suit on contract.

An action based upon a breach of contract does not fall within the ambit of S. 136, Bombay Local Boards Act, 1923, and hence suit for damages for breach of contract brought beyond three months is not barred: *Myres* v. *Bradford Corporation*, (1915) 1 *K B* 417; 22 *Bom* 289 (*F B*) and 22 *Bom* 637, *Foll*; *A I R* 1922 *Bom* 380, *Dist*; 25 *Bom* 387; 2 *Mad* 124; 22 *Mad* 524 and 31 *Mad* 522, *Ref*. [P 167 C 1]

K. H. Kelkar—for Appellants.

P. B. Gajendragadkar — for Respondents.

Patkar, J.—In this case the plaintiff sued to recover Rs. 1,777-8-0 as damages from the District Local Board of Poona, for breach of a contract entered into on 8th February 1926, with the District Local Board to construct a building at Junnar for the use of the office of the Sub-Inspector of Police. The learned Subordinate Judge held that the suit was barred under S. 136, Bombay Local Boards Act, 1923, Bombay Act 6 of 1923, which runs as follows:

"No suit shall be commenced against any Local Board, or against any officer or servant of a Local Board, or any person acting under the orders of a Local Board, for anything done, or purporting to have been done, 'in pursuance of this Act, without giving to such Local Board, officer, servant, or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of."

The suit was filed more than three months after the accrual of the alleged cause of action. On appeal, the learned Assistant Judge held that S. 136, Bombay Local Boards Act, had no application to a suit based on a contract. S. 136, Bombay Local Boards Act, is framed in terms of S. 167, Bombay District Municipal Act 3 of 1911, similar to S. 48, Bombay District Municipal Act 2 of 1884, and S. 527, Bombay Act 3 of 1888. It was held by the Full Bench in *Manohar Ganesh* v. *Dakor Municipality* (1) that the provisions of S. 48, Bombay Act 2 of 1884, do not apply to actions for the possession of land brought against a Municipality. Ranade, J., observed (p. 299):

"Actions based on contracts, and claims in the nature of ejectment, have been accordingly held not to fall within the scope of this section: *Mayandi* v *McQuhae* (2)."

And again at p. 301 observed:

"Claims based on contract can never be included under this section for the simple reason that they are not claims 'for anything done or purporting to have been done in pursuance of the Act.' Claims for the specific performance of a contract to sell or lease land will not therefore fall within the section."

In the case of *Municipality of Faizapur* v. *Manak Dulab* (3) it was held that S. 48, Bombay District Municipal Act, Amendment Act 2 of 1884, does not apply to a suit for the specific performance of a contract or for damages for breach thereof. It was observed at p. 639 as follows:

"It is thus a suit for specific performance of a contract, or for damages for breach thereof. Such a suit is not an action for anything done or purporting to be done in pursuance of the Bombay District Municipal Act; for the Act, though it may give the Municipality power to make contracts, does not authorize them to refuse to perform them, and no section of the Act has been quoted as one under which they are now purporting to act. That S. 48 does not apply to actions on contracts was ruled in *Mayandi* v. *McQuhae* (2), and was also stated in the judgment of Ranade, J., in *Manohar Ganesh Tambekar* v. *Dakor Municipality* (1)."

In *Ranchordas Moorarji* v. *Municipal Commissioner, Bombay* (4) it was observed by Sir Lawrence Jenkins at p. 393 as follows:

"There is another mode of approaching this case. It is established that notice is not required where the action is brought on a contract; for the conduct leading to the action is a wrongful act or omission under the contract, as distinct from one in the execution of the Act; and it is the breach of a specific contract that is the occasion of the right to sue."

The same view is taken by the Madras High Court in *Mayandi* v. *McQuhae* (2), in the case of *Trustees of the Harbour, Madras* v. *Best & Co.* (5) and *Muthya Chettiar* v. *Secy. of State* (6). In Halsbury's Laws of England, Vol. 23, p. 342, Art. 693, it is observed as follows:

"The performance of a specific contract made in pursuance of a public duty is not the performance of a public duty, even though the defendant is a public authority and the making of such contract would have been ultra vires save for statutory powers; nor is the performance, even by a public authority, of acts merely incidental to the ownership of property the performance of a public duty."

Consideration of the cases decided under the Public Authorities Protection Act, 1893 (56 and 57 Vic. c. 61) also leads to the same result. The question is discussed in the judgments of Farwell, J., in *Sharpington* v. *Fulham*

1. (1896) 22 Bom 289 (F B).
2. (1878) 2 Mad 124.
3. (1897) 22 Bom 637.
4. 1901) 25 Bom 387=3 Bom L R 158.
5. (1899) 22 Mad 524.
6. (1908) 31 Mad 522.

Guardians (7) and Romer, L. J., in *Jeremiah Ambler & Sons, Ltd.* v. *Bradford Corporation* (8), and Vaughan Williams, L. J , in *Lyles* v. *Southend-on-sea Corporation* (9). It was observed by Farwell, J , in *Sharpington's* case (7) as follows (p. 456):

"The public duty which is here cast . . . is to supply a receiving house for poor children. . . . In order to carry out that duty they have power to build or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action. It is a complaint of a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all is . . that if it were not for the public duty any such contract would be ultra vires."

The point has been dealt with authoritatively by the House of Lords in *Bradford Corporation* v. *Myers* (10), where Viscount Haldane observed at p. 251 as follows:

"My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority."

And at p. 252 as follows:

For it seems to me that the language of S. 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all."

The point has been dealt with by the Calcutta High Court in *Jatindramohan Ghosh* v. *Rebatimohan Das* (11), where the question was considered whether the word "act" as used in S. 80, Civil P C., is used in a generic sense and embraces a suit on a contract, and the question arising under the Public Authorities Protection Act of 1893 was discussed at pp. 968 to 975 and it was observed at p. 975, following the decision of the Privy Council in *Bhagchand Dagadusa* v. *Secy. of State* (12), that the words of S. 80 "suit . . . . . in respect of" are wider than the words of the statute of 1893, viz. :

"Any action . . . for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority."

It is not necessary in this case to consider the question whether the suit on a contract falls within S. 80, Civil P. C. In *Bhagchand Dagadusa* v. *Secy. of State* (12) the question for consideration was whether S. 80, Civil P. C., applied to a suit for an injunction to prevent serious and irreparable injury, and it was held that the section applied to all forms of suit and whatever the relief sought including a suit for injunction, as the section is express, explicit and mandatory and admits of no implications or exceptions, and after referring to cases under the Public Authorities Protection Act, 1893 it was observed that the words "in respect of" a form going beyond "for anything done or intended to be done" show it to be wider than the statute on which the English authorities were decided. It is the obligatory duty of the Local Boards under S. 50, Cl. (b), Bombay Act 6 of 1923, to make adequate provisions in regard to the construction and repair of public buildings, and under S. 45, sub-S. (2) all works other than those to be executed by the Government Executive Engineer under sub S. (1) of the section shall be executed by such agency and subject to such supervision as the Local Board at whose cost any such work is to be executed thinks fit. There is no provision in the Act, making it obligatory to execute the construction of a building through a contractor, or indicating that the execution of the construction of a building through a contractor was a performance of its statutory duties. The work could have been executed by the Government Executive Engineer if the Local Board had communicated a desire to that effect. The complaint in the present case is by a private individual in respect of private injury done to him by breach of the contract The question of public duty arises only in a remote way inasmuch as but for such public duty any such contract would be ultra vires The performance of the contract is only incidental to the statutory powers of the Local Board. We think therefore that the consensus of authority is in favour of the view that

7. (1904) 2 Ch. 449=73 L J Ch 777=91 L T 739=52 W R 617=68 J P 510=2 L G R 12/9=20 T L R 643.
8. (1902) 2 Ch 585.
9. (1905) 2 K B 1=74 L J K B 484=92 L T 586=69 J P 193=3 L G R 691=21 T L R 389
10. (1916) 1 A C 242=85 L J K B 146=114 L T 83=80 J P 121=14 L G R 130=60 S J 74.
11. A I R 1932 Cal 275=138 I C 4=59 Cal 961.
12. A I R 1927 P C 176=104 I.C 257=54 I A 338=51 Bom 725 (P C).

an action based upon a breach of con tract would not fall within the ambit of S. 136, Bombay Local Boards Act of 1923. The only case cited in favour of the appellants is *Baban Hemraj* v. *City Municipality, Poona* (13), where the plaintiff entered into a contract with the defendant Municipality to carry soil water for one year, and the Municipality levied from time to time fines and penalties from the plaintiff for breaches of contract, as provided for in the contract, and the plaintiff sued to recover the amount of fines and penalties so levied, and it was held that the suit was governed by S. 167, Bombay District Municipal Act, 1901, and not having been brought within a period of six months from the acts complained of was time barred. The question arising in this case does not appear to have been discussed in the judgment. The case might also be distinguished on the ground that the Municipality claimed, according to the terms of the contract, to deduct a certain amount from the plaintiff's deposit for non-performance of his contract, and as such deductions were justified under the powers conferred upon them by the Act it was held that their powers to enforce the contract, according to the construction they put upon it, must also be in pursuance of the Act. If it was intended to hold that suits for damages for breach of contract come within the protection afforded by S. 167, Bombay District Municipal Act, corresponding to S. 136, Bombay Local Boards Act, I am with all respect unable to agree. The view which we have arrived at has also been accepted by Baker, J., in *Poona City Municipality by its President* v. *Dhondiba Ganpatrao Kenjale* (14). I think therefore that the view taken by the learned Assistant Judge is right and this appeal must be dismissed with costs.

Murphy, J.—The point to decide is whether the plaintiff's suit, which was one for damages for breach of a contract to build an office for the Sub-Inspector of Police and was brought against the Poona District Local Board, is within limitation, it not having been filed within three months of its alleged cause of action, as is required by S. 136, Bombay Local Boards Act, 1923. The learned Assistant Judge has found that since the acts complained of were not done in pursuance of the provisions of the Act, the bringing of the suit beyond three months did not bar it. The appellants rely on a ruling in *Baban Hemraj* v. *City Municipality, Poona* (13). There are numerous provisions to the same effect in many special Acts relating to public bodies all similarly curtailing the usual periods of limitation, and the general view taken of such restrictions is that given in *Myers* v. *Bradford Corporation* (15) the same case having been considered by the House of Lords (10), a distinction being drawn between acts actually done in pursuance of the directions of the statute and acts incidental to the exercise of powers arising out of the power to enter into contracts, but not in reality provided for by the statute. The Bombay Full Bench case is *Manohar Ganesh* v. *Dakor Municipality* (1) and there is another case on the same point in the same volume in *Municipality of Faizpur* v. *Manak Dulab* (3) in which the question of breaches of contract is especially noticed and discussed. To the same effect is the case of *Ranchordas Moorarji* v. *Municipal Commissioner, Bombay* (4). The current of decisions with the exception possibly of the case in *Baban Hemraj* v. *City Municipality, Poona* (13) is clearly to the effect that such cases, as the one we have to deal with, are not brought for acts done in pursuance of the provisions of the Act, and the exception seems, as far as one can gather, to have been made, in the special circumstances of fines and penalties inflicted by a Local Board on a contractor, the authorities being neither referred to nor discussed. I think that the decree appealed against is in harmony with the rulings of this Court generally —and with all other High Courts also— and that it should be confirmed and the appeal dismissed with costs.

K.S. *Appeal dismissed.*

13. A I R 1922 Bom 330=64 I C 357=46 Bom 123.
14. First Appeal No 30 of 1927, Decided on 19th January 1932 by Baker, J.

(15) (1915) 1 K B 417=84 L J K B 306=112 L T 206=79 J P 130=13 L G R 1=59 S J 57.

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PATKAR AND MURPHY, JJ.

Nilaji Moroba Naik and *others*—Plaintiffs—Appellants.

v.

Nagindas Motilal and *others*—Defendants—Respondents.

First Appeal No. 335 of 1927, Decided on 26th August 1932, from decision of First Class Sub-Judge, Thana, in Civil Suit No. 65 of 1922.

(a) Sharkati Inam Village—Kowl passed by agreement known as mafi istava kowl—Effect of such agreement stated

The inamdars passed a kowl to two persons under an agreement which was known as "mafi istava kowl," under which the land was given for some years as exempt from payment of any revenue or rent. After the years of exemption the land was given at an annually increasing assessment or rent, i. e., "istava," and after the period of istava, the tenants were to pay every year certain fixed quantity of paddy slightly greater than the dhep.

Held: that the effect of such an agreement was to create a permanent tenancy after the period of mafi and istava on payment of the sum named in the document as the full assessment and that the yearly payment was rent in kind and not merely assessment: 10 *B H C R* 216 and 6 *Bom* 598, *Ref* [P 169 C 1, 2; P 170 C 2]

(b) Bombay Land Revenue Code (5 of 1879), Ss. 217, 68 and 83—Right of holders in alienated villages—Survey settlement—Effect—Permanent tenant though holder is not occupant.

A person holding land in an alienated village as a permanent tenant under S. 83, Bombay Land Revenue Code, becomes, on the introduction of the survey settlement into the village, entitled to the rights and affected with the responsibilities of a holder in an unalienated village by virtue of S. 217, Bombay Land Revenue Code, and he remains what he was, a tenant, and does not become an occupant and is liable therefore to pay enhanced rent to his landlord according to the contractual liability. Therefore he is not entitled to the rights embodied in S 68, Bombay Land Revenue Code, including the right to hold the land on payment of land revenue only. The introduction of the survey settlement does not confer on a tenant a right which belongs to an occupant in an unalienated village: *A I R* 1925 *Bom* 435, *Foll.*; *A I R* 1926 *Bom* 257, *Expl.* [P 171 C 2]

Similarly the inamdar is also prevented from avoiding his contractual liability and demanding a higher rent according to the survey rates. The utmost benefit which the tenants can derive as against their landlords from being entered as occupants is a right to claim a deduction of the amount of assessment paid by them directly to Government: 3 *Bom* 134, *Rel on.* [P 172 C 1, 2]

(c) Bombay Land Revenue Code (5 of 1879), S. 74 — Notice of relinquishment under S. 74—When holder is competent to accept pointed out.

The holder of an alienated village or a group of alienated lands shall not receive relinquishments from his inferior holders as if he were a Mamlatdar or Mahalkari receiving relinquishments from occupants under S. 74 unless his village or lands have been surveyed and he has been specially authorized to receive such relinquishments: *A I R* 1921 *Bom* 371, *Rel on.* [P 173 C 1]

(d) Bombay Land Revenue Code (5 of 1879)—"Holder" has got different meanings in Code.

There is no accurate definition of holders of land in alienated villages; the meaning varies according to the context; in S. 217 the word "holders" refers to inferior holders; in S. 88 it refers to superior holders; and in S. 76 it refers to superior holders. [P 173 C 2]

(e) Transfer of Property Act (1882), Ss. 117 and 111 — Agricultural tenancy cannot be determined by express surrender.

The Transfer of Property Act is not applicable to an agricultural tenancy under S. 117, T. P. Act, and therefore S. 111, Cl. (e), T. P. Act, would not apply, under which a lease of immovable property can be determined by express surrender. [P 173 C 2]

M. R. Jayakar and *G. S. Rao*—for Appellants.

K. N. Dharap and *P. N. Shende*—for Respondents.

Patkar, J.—In this case the plaintiffs sued to recover Rs. 7,284-12-0 as the price of 2,428 maunds and seven payalis of paddy on the allegation that the plaint property was let in the year 1853 on a permanent lease to two persons, Jayaram and Ramchandra, that the right of cultivation was sold and purchased by one Ganpat Sakharam from whom the father of defendants 1 and 2 and grandfather of defendants 3 and 4 purchased it subject to the conditions of the lease in 1886, and that the father of defendants 1 and 2 purchased one-twelfth share in the plaint property. The suit was brought in respect of the eleven-twelfths share of the right belonging to the inamdars. The defendants contended that they were the owners of the property, that the paddy mentioned in the kowl denoted the dhara due to the inamdars and the plaintiffs can only claim the dhara in cash, that no relation of landlord and tenant existed between the parties, and that the defendants gave notice to the plaintiffs that they did not wish to continue the land for cultivation on the terms settled between the parties. The learned Subordinate Judge held that the plaintiffs-inamdars were the owners of the land, that the liability reserved under the kowl was to pay rent, that the predecessors of the defendants acquired the right of a tenant, and that the defen-

dants remained as tenants, but held that the tenancy was put an end to by the rajinama, Ex. 79, given by the tenants to the inamdars.

The property in suit is a khar known as Mathekhar in the village of Anjur which was given in inam to the ancestors of the plaintiffs and defendants 5 to 18. The village is a sharakati village. By the sanad, Ex. 48, the inamdars were given the management of the entire village with a condition that they should recover the full land revenue and pay Government a lump sum for their one-third share. The system of farming was subsequently changed and the inamdars continued to pay one-third of the actual recoveries to Government. In 1853 the inamdars passed a kowl, Ex. 47, to two persons, Jayaram Yadavji and Ramchandra Jagannath, under an agreement which is known as "mafi istava kowl," under which the land is given for some years as exempt from payment of any revenue or rent. The condition is signified by the word "mafi." After the years of exemption the land is given at an annually increasing assessment or rent, i. e. "istava." The conditions of the kowl in the present case show that the lessee had to spend Rs. 2,001 on the embankments of the khar, and though the land was capable of yielding 17 mudas of 24 maunds each, the land was given as mafi i. e., free from payment of assessment for a period of 27 years from 1854 to 1881-82, and on istava, i. e., annually increasing tax, for a term of five years from 1882-83 to 1886-87 under a graduated rising scale of payment, and after the period of istava, the tenants were to pay every year mudas 17½ and 4 maunds of paddy, each muda being of 25 maunds. There was further an agreement in Cls. 6 and 7 that the tenant was not to pay any assessment to Government and that in case the Government should in any year recover the vasul forcibly, the mafi years would be extended by half as much over. It appears from the kowl of 1853 that the land was let to other tenants on similar terms but without success, and the inamdars could not afford to repair the embankments and hence the kowl was given to the persons named above.

The effect of such an agreement is to create a permanent tenancy after the period of mafi and istava on payment of the sum named in the document as the full assessment : see *The Sub-Collector of Colaba* v. *Ganesh Moreshvar* (1). In 1861 eight years after the date of the kowl, the survey settlement was introduced into the village, prior to which the village had not been surveyed. In 1863, on account of default in payment of Government revenue, the right of the permanent tenant was sold and purchased by one Ganpat Sakharam on 4th May 1863, subject to the conditions of the kowl given by the inamdars to the original grantees. In September 1886 Ganpat Sakharam sold his right to the ancestor of defendants 1 to 4 by Ex. 62. By the survey of 1861 the land was assessed at Rs. 266-9-0 including the local fund cess. It appears that the auction-purchaser paid one-third of the revenue to Government every year, and as the grantees were obliged to pay the Government assessment the mafi period which was to end in 1881 was extended to 1891. It appears that from 1892 Motilal, the father of defendants 1 and 2 and grandfather of defendants 3 and 4, commenced paying 17½ mudas and 4 maunds in kind to the inamdars yearly as provided in the kowl. In 1896-97 the revision survey settlement was introduced into the village and the assessment on the Mathekhar was raised to Rs. 283. In 1900 Motilal appears to have stopped paying the stipulated rent of 17½ mudas and 4 maunds to the inamdars but paid survey assessment in cash.

It is contended on behalf of the respondents that the amount which was stipulated in the kowl of 1853 was assessment and not rent. The learned Subordinate Judge held that the kowl created the relation of landlord and tenant between the plaintiffs-inamdars and the grantees, and the yearly payment was rent. The inamdars though grantees of the revenue and not of the soil, would be entitled to place tenants in possession of the unoccupied lands not by virtue of any interest in the soil but as entitled to make the most they can out of it by way of revenue, according to the decision in *Ramchandra* v. *Venkatrao* (2) and *Ganpatrao Trimbak* v. *Ganesh Baji* (3).

1. (1873) 10 B H C R 216.
2. (1882) 6 Bom 598.
3. (1885) 10 Bom 112.

In the year 1853 the village was not surveyed, and the amount fixed by the kowl was based on the yielding capacity of land. It appears from the recitals in the kowl that the dhep, which was the amount payable in respect of the land according to its yielding capacity, was 17 mudas of paddy of 24 maunds per muda. But after the period of the istava the amount to be paid by the grantees was not the dhep of 17 mudas of 24 maunds each, but was 17½ mudas and four maunds each muda being of 25 maunds. It therefore appears that the agreement on the part of the grantees was to pay more than the customary rent in kind leviable on the land. It therefore would not represent merely the assessment but rent. Eight years afterwards the survey assessment was fixed at Rs. 266-9 0 including the local fund, and the property was sold for nonpayment of the assessment and was purchased by Ganpat Sakharam subject to the conditions of the kowl. It would therefore appear that Ganpat Sakharam purchased the right determined by the kowl with the liability to pay the permanent rent of 17½ mudas of 25 maunds each.

It was never effectively contended up to this time that the defendants were liable to pay only the survey assessment of Rs. 266-9-0 which was enhanced to Rs. 283 in the revision survey of 1896-97. Motilal himself paid the amount of 17½ mudas of paddy as provided in the lease to the inamdars from 1892, after the extension of the mafi period was over, till 1900. In 1909 Motilal purchased one-twelfth of the share of one of the inamdars by a sale deed Ex. 56, in which reference was made to the receipt by the inamdars of 17½ mudas of paddy, each muda being of 25 maunds, and the one-twelfth share of the dues amounted to 37½ maunds of paddy. That right was purchased by the predecessor-in-title of defendants 1 to 4. who had also purchased the rights of the grantees under the kowl. They are therefore liable to pay eleven-twelfths of the stipulated dues in kind liable to be paid under the kowl.

It appears further that the status of Motilal, the predecessor-in title of the defendants, as tenant was judicially established in previous litigations. In 1910, one of the inamdars, Niloji Moroba, filed Suit No. 171 of 1910 in the Bhiwandi Court on behalf of all the inamdars against Motilal for recovery of of rents under the kowl, and he succeeded in getting a decree for rent for the years 1907 to 1909 at the stipulated rate of 17½ mudas. The decree was confirmed in appeal on 25th April 1914. On 4th May 1914, the defendants gave notice, but the inamdars having replied that the lease could not be given up, the defendants gave another notice Ex. 79, on 25th November 1914, purporting to be given under S. 83, Bombay Land Revenue Code. It appears that S. 83 referred to in the notice was a mistake for S. 74, Bombay Land Revenue Code. The notice is given on behalf of the defendants, the heirs of Motilal. The inamdars replied that the lease could not be abandoned in that way. In 1915, the inamdars brought a suit, No. 259 of 1915, for arrears from 1909 to 1914. The inamdars succeeded in the suit. On appeal the suit was dismissed on the ground that S. 217, Bombay Land Revenue Code, applied. In second appeal the new contention was disallowed and the inamdars' claim was allowed on the principle of res judicata. The present suit was filed in 1922 for the recovery of the arrears of rent for the previous six years.

From the above facts it is clear that the stipulated amount in the kowl was in excess of the dhep of the land. This circumstance indicates that the amount stipulated was not merely the customary or mamul assessment but something more. This in itself is an indication that the payment stipulated under the kowl was in the nature of rent and not merely assessment. The contention that the amount was merely assessment had always been negatived in the previous litigations, and the relation of landlord and tenant has been held established in the previous litigations. The decisions in the previous cases do not operate as res judicata as the present suit is brought in the First Class Subordinate Judge's Court while the previous suits were instituted in the Second Class Subordinate Judge's Court. Having regard to the fact that Motilal purchased one-twelfth share of the inamdar's right, which was to recover 37½ maunds out of the total amount of 17½ mudas of paddy to be recovered under the kowl,

and the fact that the auction sale in 1863 in favour of the vendors of Motilal was subject to the conditions of the kowl, and the sale-deed, Ex. 62, in favour of Motilal was subject to the condition on which the vendors purchased the land, it is clear that under the kowl, which created the relation of landlord and tenant between the inamdars and the original grantees, the defendants acquired the right of a permanent tenant under the conditions imposed under the kowl of 1853. I therefore agree with the view of the lower Court that the defendants acquired the right of a permanent tenant under the kowl, and that the payment stipulated under the kowl was not assessment but rent in kind.

It is however contended on behalf of the respondents that, after the introduction of the survey settlement in 1861 and the revision survey settlement in 1896-97, the defendants acquired the rights of an occupant under S 217, Bombay Land Revenue Code, and reliance is placed on the decision in the case of *Nanabhai* v. *Collector of Kaira* (4), where it was held that S. 217, Bombay Land Revenue Code, was not restricted in its application to registered occupants only; it invested the holders of land in alienated villages with the same rights and imposed upon them the same responsibilities in respect of lands in their occupation that the occupants in unalienated villages had, and that the term "holders" was wide enough to include even a tenant who had entered into possession under an occupant. That case related to a permanent tenant who was liable to pay the customary rent and the suit was brought for enhancement of the rent, and it was held that the right to cultivate the land vested in the tenant, and the right carried with it a right to hold during the continuance of the settlement at no higher rent than the survey assessment, as soon as by the will of the inamdar the settlement was introduced into the village. That decision related to a permanent tenant who paid the customary rent and not a tenant who had entered into contractual relations with the inamdar. But it appears that the authority of that decision is weakened by the change in S. 217, Bombay Land Revenue Code, and the decisions in the cases of *Kondi* v. *Vithalrao* (5) and *Suryajirao* v. *Sidhanath* (6).

In S. 217 the words "holders of land" have been substituted for occupants. The result of the amendment is that the holders in general have the same rights in alienated villages after the settlement as they have in unalienated villages. It was held in *Kondi* v. *Vithalrao* (5) that a person holding lands in an alienated village as a permanent tenant under S. 83, Bombay Land Revenue Code, becomes, on the introduction of the survey settlement into the village, entitled to the rights and affected with the responsibilities of a holder in an unalienated village by virtue of S. 217, Bombay Land Revenue Code, and that he remains, what he was, a tenant, and does not become an occupant, and is liable therefore to pay enhanced rent to his landlord. Under S. 3, Cl. (16), Bombay Land Revenue Code, "occupant" means a holder in actual possession of unalienated land, other than a tenant, and "holder of land" under S. 3, Cl. (11), means a person who is lawfully in possession of land, whether such possession is actual or not, and therefore, where a person is a permanent tenant, as the defendants are in the present case, he continues to be a holder, that is a tenant, and not an occupant and therefore not entitled to the rights embodied in S. 68, Bombay Land Revenue Code, including the right to hold the land on payment of land revenue only. The introduction of the survey settlement does not confer on a tenant a right which belongs to an occupant in an unalienated village.

In *Suryajirao* v. *Sidhanath* (6), where there was an agreement between the inamdar and the tenant to receive a fixed rent of Rs. 87 odd, it was held that the inamdar could not, after the introduction of the survey settlement, enhance his rent. It was held that in unalienated villages it is competent to Government to enter into contractual relationship with tenants or occupants who might acquire fixity of tenure and fixity of rent, and that in an alienated village, where the alienee has entered into contract with his tenant granting not only fixity of tenure but also fixity

4. (1910) 34 Bom 686=7 I C 949.

5. A I R 1926 Bom 257=94 I C 662=50 Bom 155.

6. A I R 1925 Bom 435=89 I C 65.

of rent, the provisions of S. 217, Bombay Land Revenue Code do not enable such alienee to avoid his contractual liability and enforce against his permanent tenants the payment of assessment levied on occupancy of land. It would therefore follow from the changed phraseology in S. 217 that the defendants who had acquired the right of a permanent tenant would continue to be permanent tenants and not occupants, and therefore would not be entitled to the benefit of S. 68 of continuing in possession of the land on payment of only the Government assessment, and that a tenant continues as a tenant liable to pay rent according to the contractual liability between the parties and not as an occupant as was held in the previous case of *Nanabhai* v. *Collector of Kaira* (4).

According to the decision in *Rajya* v. *Balkrishna Gangadhar* (7) an inamdar, even if only a grantee of revenue, in case of a holding later in its origin than the inam, can place tenants in possession, and lands comprised in such holding would be the sheri lands of the inamdar, and in respect of such holding direct contractual relations would be established between the inamdar and the holder. Further, the contractual relations between the inamdar and the tenant are not in any way interfered with by the introduction of the survey settlement, and the inamdar is prevented from avoiding his contractual liability and demanding a higher rent according to the survey rates. As the provisions of S. 217 do not enable the alienee inamdar to avoid his contractual liability and enforce against his permanent tenants the payment of assessment levied on the land, which is higher than the fixed rent contracted between the parties, it would follow that the provisions of S. 217 would not enable the permanent tenant to avoid his contractual liability and enforce against the inamdars the right of having only the assessment which is lower than the stipulated rent levied against him.

No point has been raised before us as to whether the survey settlement was introduced with or without the consent of the inamdars in the Sharakati village of Anjur so as to attract or prevent the operation of Ss. 216 and 217, Bombay Land Revenue Code, according to the ruling in *Gangadhar Hari* v. *Morbhat Purohit* (8) and the decision of the Full Bench in *Sitaram* v. *Laxman* (9). I have not therefore gone into the question as the point was not raised before us. If the defendants are tenants, S. 217, Bombay Land Revenue Code, could be of no assistance to them, for it does not confer on them the rights of an occupant under S. 68, Bombay Land Revenue Code.

It is however contended that the lands were entered in the khata of the original grantees under the kowl, and and also the auction-purchaser and the predecessor-in-title of the defendants, and therefore they are occupants of the lands. It appears from the previous dealings between the parties and the circumstances to which I have referred that the defendants continued as tenants and not as occupants. The utmost benefit which the defendants as tenants can derive as against their landlords from being entered as occupants is a right to claim a deduction of the amount of assessment paid by them directly to Government according to the decision in the case of *D. R. Bam* v. *Survey Commissioner and The Collector of Ratnagiri* (10).

The next question is whether the permanent tenancy has been put an end to by the notice of relinquishment, Ex. 79. It purports to have been given under S. 83, Bombay Land Revenue Code, but it appears that S. 83 is a mistake for S. 74, Bombay Land Revenue Code. The defendants are permanent tenants and are inferior holders, the inamdars being superior holders under S. 3, Cl. (13), Bombay Land Revenue Code. Under S. 74, Bombay Land Revenue Code, the occupant may relinquish his land subject to any rights, tenures, incumbrances or equities, lawfully subsisting in favour of any person (other than Government or the occupant) by giving notice in writing to the mamlatdar or mahalkari before 31st March in any year.

It was held in the case of *Shidhraj* v. *Dari* (11) that where the survey settlement has been introduced into an alienated village and where the powers

7. (1905) 29 Bom 415=7 Bom L R 439.

8. (1893) 18 Bom 525.
9. A I R 1921 Bom 87=64 I C 162=45 Bom 1260 (F B).
10. (1878) 3 Bom 134.
11. A I R 1921 Bom 371=45 Bom 898=61 I C 464.

contemplated in S. 88, Cl. (e), Bombay Land Revenue Code, have been given to the inamdar, the inamdar is entitled to receive notices of relinquishment under S. 74 of the Code from the persons in occupation of the inam land, and that such notices are exempt from registration under S. 90, Registration Act, 1908. The question of registration is not of any importance. The only question is, whether the notice of relinquishment given by the defendants is valid. If it is valid, then no registration is necessary. If it is not valid, registration would not validate the notice under the Bombay Land Revenue Code. The only question is, whether the notice of relinquishment, Ex. 79, is a valid notice. Under S. 74, Bombay Land Revenue Code, such a valid notice of relinquishment can be given by an occupant in an unalienated village to a mamlatdar or a mahalkari. But the defendants being tenants remain as tenants and do not acquire the right of an occupant in an unalienated village under S. 217, Bombay Land Revenue Code. Under S. 76 the provisions of S. 74 have been made applicable to holders of alienated land. But it was held by Fawcett, J., in that case that the expression "holders of alienated land" in S. 76 would ordinarily mean superior holders as inamdars or may include holders of small inams, but it would not include tenants under the inamdars, and in the opinion of Fawcet, J., S. 88 clearly shows the intention of the legislature that the holder of an alienated village or a group of alienated lands shall not receive relinquishments from his inferior holders as if he were a mamlatdar or mahalkari receiving relinquishments from occupants under S. 74 unless his village or lands have been surveyed and he has been specially authorized to receive such relinquishments.

The proviso to S. 88, Bombay Land Revenue Code, indicates that the power under S. 88, Cl. (e), shall be conferred only on the inamdars, i.e., holders of lands to which a survey settlement has been extended under the provisions of S. 216. There must therefore be introduction of survey settlement and conferment of power under S. 88 (e) on the inamdar to receive notices of relinquishment. I may in this connexion also refer to Anderson's Land Revenue Code, Manual, p. 43, note (iv) to R. 74, Chap. 12. Apart from the question whether the defendants as tenants in an alienated village could give up their tenancy by relinquishment under S. 74, Bombay Land Revenue Code, it appears that the inamdar cannot accept such relinquishment from inferior holders as if he were a mamlatdar or a mahalkari unless the village has been surveyed and he has been specially anthorized to receive such relinquishments.

It is contended on behalf of the appellant that he has not been authorized to receive such relinquishments under S. 88, Cl. (e), Bombay Land Revenue Code, and has put in an affidavit to the effect that none of the cosharers who are inamdars has been authorized under S. 88 (e) to receive relinquishments. An opportunity was given to the other side to contest this point, but no affidavit has been filed contradicting the affidavit on behalf of the appellant. It would therefore appear according to the ruling in *Shidhraj* v. *Dari* (11), that the relinquishment, Ex. 79, is not effectual to extinguish the tenancy.

There is no accurate definition of holders of land in alienated villages. According to Mecleod, C. J., in the case of *Shidhraj* v. *Dari* (11), the meaning varies according to the context, that in S. 217 the word "holders" refers to inferior holders, in S. 88 it refers to superior holders, and in S. 76 it refers to superior holders. According to Fawcett, J., it refers in S. 76 also to a holder of small inams who is either a superior or an inferior holder. It is desirable that the legislature should express its intention clearly as to the effect of the introduction of survey settlement in ordinary and sharakati inam villages on the rights of different kinds of holders and tenants in alienated villages paying either stipulated rent or old assessment.

The Transfer of Property Act is not applicable to an agricultural tenancy under S. 117, T. P. Act, and therefore S. 111, Cl. (e), T. P. Act, would not apply, under which a lease of immovable property can be determined by express surrender, that is to say in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them. There is besides no evidence in this case of mutual agreement between the parties.

It is contended on behalf of the respondents that the liability of an assignee does not arise from privity of contract, but only on account of privity of estate, and reliance has been placed on Halsbury's Laws of England, Vol. 18, paras. 1131 to 1133, and it is contended that since the land is relinquished, the liability to pay the rent is put an end to. It is possible for the defendants to extinguish their liability by assigning even though the new assignee be a person of no substance, but unless the defendants get rid of their title in themselves as permanent tenants by assigning it to some other persons, their liability as an assignee of the right of the permanent tenancy to pay the rent reserved under the kowl is not extinguished. Lastly, it is contended on behalf of the respondents, relying on the decisions in the cases of *Bhutia Dhondu* v. *Ambo* (12), *Muneeruddeen* v. *Mahomed Ali* (13) and *Ram Chung* v. *Gora Chand* (14), that the relinquishment by notice was sufficient and extinguished the liability of the defendants But in those cases the relinquishment was accepted by the landlord and the lands were let to other tenants. The conduct of the landlord in accepting the relinquishment and letting the lands to another would amount to an implied surrender or acceptance of the relinquishment •

I think therefore that in the present case the defendants have acquired a right of permanent tenancy under the kowl, Ex. 47, and that the relinquishment, Ex. 79, is insufficient to put an end to the liability to pay the rent imposed by Ex. 47, and therefore the plaintiffs are entitled to a decree for the amount claimed. I would therefore reverse the decree of the lower Court and pass a decree in favour of the plaintiffs for the amount of Rs. 7,284-12-0 with costs throughout.

Murphy, J.—The question raised in this appeal is whether the plaintiffs who are the superior holders of the defendants and the alienees of the village where the land for the rent of which the suit has been brought is situated, are entitled to recover it in the given circumstances. The village is a sharakati inam one, that is, partly alienated—here to the extent of two-thirds, and partly owned by Government, and the revenue management is entrusted to the alienees. It has been surveyed and its land is assessed, including that for which rent is claimed, but the claim is not for assessment, but for the rent fixed as payable under a permanent lease granted to two persons on 20th August 1853, by the alienees of the village. The original lessees lost their rights in 1863, when owing to their failure to pay the assessment their rights under the lease were sold by the revenue authorities and purchased by a third person, who in turn sold to the predecessor-in-interest, the father of defendants 1 and 2 and grandfather of defendants 3 and 4—who had also bought a one-twelfth share of the inamdars' rights over the same land. The rent sued for is for six years with interest and the liability to pay it is denied on the ground mainly that notice of relinquishment has been duly given under the Land Revenue Code in 1915, and alternatively that is not rent, but assessment which is claimable. The learned Subordinate Judge has found in the defendants' favour on the point of relinquishment and has dismissed the suit.

The lease is of a peculiar character. The land is called a " khar " and grows salt paddy, and its cultivation requires the erection and maintenance of embankments, to save the crop from being flooded by salt water. In 1853 the embankments had been neglected and required re-erection. The terms of the lease were on the " mafi istava " basis, that is, the tenant undertook to make good the embankments and pay a fixed rent in kind, but for a term of years was free of all rent, and thereafter for another term paid a gradually increasing rent till the highest rate was reached, from which point there was no variation except for some minor agreements which are not disputed, as to what should happen if Government assessed the land, and which were carried out. Rent has been paid as agreed on for many years, and has also been collected by suits, in the Bhiwandi Court twice up to 1915, when notice of relinquishment was given and possession was apparently abandoned. The real reason for the dispute apparently is that owing either to neglect or

12. (1888) 13 Bom 294.
13. (18 6) 6 W R 67.
14. (1878) 24 W R 344.

to natural causes, the land has become unprofitable to cultivate on the terms fixed.

In an ordinary non-alienated village an estate may be relinquished to Government by giving notice to the Mamlatdar at a prescribed time. In an alienated village the rule varies. When a survey settlement has been introduced, the occupancy tenants come under it and pay the assessment fixed though tenants continue to pay rent in certain cases. If the alienee in such a village is empowered to accept relinquishments, an occupancy tenant may relinquish to him; otherwise though there is no specific rule presumably to the Mamlatdar. This is because the Land Revenue Code comes into operation. A survey assessment has been introduced in the village in question, and the land has been assessed, but the alienees are not apparently empowered to accept relinquishments. The defendants should therefore have sent their notice of it to the Mamlatdar and not to the alienees, that is, on the footing of their being occupancy tenants. But this character is one which they do not seem to have. As the Land Revenue Code now stands, they are "holders of land," which expression would include tenants and looking to the origin of this tenancy, which is known and evidenced by a registered document, they are clearly permanent tenants on an agreed rent. The conditions on which a tenancy may be given up in the Transfer of Property Act, do not apply to agricultural leases, and a mere notice to the landlord is not enough here, as there is no provision in the agreement for such a relinquishment. I do not know if liability might have been escaped by pleading the impossibility of further cultivating the "khar." It was not pleaded and there was no evidence to this effect, and if the difficulty is due to neglect of embankments, it would not avail the defendants. I think that on the facts, though it may be a hard case, the lower Court's decision is not correct and that the decree challenged must be reversed and the appeal allowed on the terms stated in my learned brother's judgment.

K.S. *Appeal allowed.*

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* A. I. R. 1933 Bombay 175

MURPHY AND NANAVATI, JJ.

Prithviraj Chothmal Marwadi and *others*—Plaintiffs - Appellants.

v.

Lonavla City Municipality—Respondent.

Second Appeal No. 363 of 1930, Decided on 5th October 1932.

* **(a) Civil P. C. (1908), O. 1, R. 8—Revised assessment by Municipality — Suit for restraining Municipality for collecting revised taxes — Some assessees cannot represent others.**

A revised assessment affects a variety of persons with a variety of different interests and some of the assessees are not entitled to represent the other assessees in a suit to obtain a permanent injunction restraining the Municipality from collecting the taxes under the revised assessment. [P 176 C 2]

(b) Bombay City Municipalities Act (18 of 1925), S. 206—All plaintiffs not giving notice —Suit is maintainable with regard to those who have given notice.

Where notice is required under the Act to be given to the Municipality but only two out of the five plaintiffs have given the required notice, the suit is not bad for want of notice as far as persons giving notice are concerned, although all the plaintiffs have not given the required notice [P 176 C 2]

(c) Bombay City Municipalities Act (18 of 1925), Ss. 81, 58 (b) and 46—Standing Committee—Executive functions — Rule delegating powers of Municipality to President held ultra vires.

The Municipality of Lonavla, constituted under the Bombay City Municipalities Act, 1925, did not appoint a Standing Committee as required by S. 37 but made a rule which was sanctioned by the Government under S. 58 (b) read with S. 46 of the Act delegating to the President all powers or duties or executive functions to be exercised or performed on behalf of the Municipality. The Municipality prepared under S. 80 a revised assessment list of houses within its limits and objections to which were disposed of by the President under the authority of the above rule:

Held: that the provisions of S. 37 (2) for the constitution of the Standing Committee were mandatory and did not contemplate the exercise of the functions of the Standing Committee by any other body, or their delegation to anyone else otherwise than as mentioned in the proviso under S. 81; the rule delegating the powers of the Standing Committee to the President was therefore ultra vires and did not authorize him to hear and decide the objections. [P 178 C 1, 2]

(d) Bombay City Municipalities Act (1925), S. 58—Rules not inconsistent with the Act only can be made.

Under S. 58 the Municipality can make rules not inconsistent with the Act for regulating the conduct of its business and the delegation of any of its powers or duties. [P 178 C 1]

(e) Bombay City Municipalities Act (1925), S. 81—Executive function explained.

The term 'executive functions' is nowhere defined, but it cannot be extended to include a

function to consider objections and dispose of them on general principles. Such a duty has the character more of a judicial than of an executive function. [P 178 C 2]

P. V. Kane—for Appellants.

E. B. Ghaswala and *G. S. Mulgaonkar*—for Respondent.

Nanavati, J.—This is a second appeal arising out of a suit in the Court of the Second Class Subordinate Judge at Vadgaon filed by five plaintiffs of whom the present appellants are Nos. 1 and 4. The suit was filed against the Lonavla City Municipality as defendant 1, and the President of the City Municipality as defendant 2. The relief asked for was a permanent injunction against the City Municipality not to collect the taxes on the basis of the new list, on the ground that their objections had not been heard and disposed of by a Standing Committee as required under S. 81, and that defendant 2 disposed of those objections without any authority. The procedure therefore was alleged to be illegal, and not such as could authorize the recovery of the taxes. Various issues were raised as to the maintainability of the suit, five of which were disposed of as preliminary issues, which I will refer to later. The main issues, which were Nos. 7 and 8, viz., "whether the President was legally empowered by Government Resolution to revise the proposed list," and "whether the plaintiffs proved that the resolution empowering the President to revise the list was ultra vires of Government if the point is open to the plaintiffs in this case," were decided by the trial Court in favour of the defendants and the suit was dismissed.

On appeal the District Judge of Poona differed from the learned trial Judge on some of the preliminary points, his view being in favour of the Municipality, and on the main issue he agreed with the trial Court holding that the delegation in question was intra vires, and he accordingly dismissed the appeal. The present appellants who are plaintiffs 1 and 4 have appealed against that decision. The main questions which have been argued before us are three or four in number, the first being the question whether the appellants were entitled to sue in a representative capacity under O. 1, R. 8. The learned District Judge has held against the appellants' contention and has come to the conclusion that the suit as filed by the plaintiffs was not maintainable.

Now, this was a case in which the plaintiffs claimed to bring a suit not only on behalf of themselves, but on behalf of all the other assessees whose assessments had been revised by the Municipality, as they claimed, illegally. The learned District Judge pointed out that none of the other assessees had objected to the new list, but he appears to be in error because as a matter of fact over 170 persons did object to the revised assessments in their own case. The further remark of the learned District Judge that none of them have appealed against it to the Magistrate under S. 110 of the Act may be correct. But, at any rate, when notice under O. 1, R. 8, was given by the Court, it is a fact that none of them offered to join as co-plaintiffs, nor did any of them object to the plaintiffs bringing the suit. It may be open to doubt whether all the 170 persons, who objected to the revised assessments have felt aggrieved, as the plaintiffs have felt, by the disposal of their objections by the President instead of by the Standing Committee. The revised assessment must affect a variety of persons with a variety of different interests and, it would hardly be fair, in my opinion, to assume that the five plaintiffs or the two appellants were entitled to represent them in a suit of this character. But I do not agree with the learned District Judge in thinking that the suit was for that reason not maintainable at all. The plaintiffs, as far as they themselves were concerned, were certainly entitled to bring a suit on their own behalf, and to that extent the suit must be held to be maintainable.

The second question discussed by the learned District Judge refers to the notice which is required under the Act to be given to the Municipality. It is admitted that only the two appellants out of the five plaintiffs had given the required notice. The learned trial Judge held that as far as they were concerned the suit was not bad for want of notice, but the learned District Judge appears to have thought that as all the plaintiffs had not given the required notice, the suit was bad. I do not see why the suit should not be maintainable on behalf of

the two plaintiffs who had given the required notice under the Act. In my view therefore both these objections, though valid, so far as they go, are not fatal to the suit as far as the two appellants are concerned. A third preliminary point as to limitation was not pressed by the learned counsel and I therefore need not discuss it. The only substantial point that now remains to be considered is the question whether the procedure followed by the Municipality in providing for the disposal of the objections to the revised assessments by the President was valid. On this point the judgment of the learned District Judge sets out the relevant sections of Act 18 of 1925, with which we are concerned, and I therefore need not set them out again in full. S. 81 (2) provides for the objections to the valuation and assessment of any property to be made to the Standing Committee within a certain time after the publication of the assessment list, and for the disposal of the same by that Committee. It is stated in a proviso:

"that powers and duties of the Standing Committee under this subsection may be transferred to any other committee appointed by the Municipality or with the permission of the Commissioner, to any officer or pensioner of Government."

Admittedly the President does not come within the terms of this proviso. S. 37 provides for the constitution of the Standing Committee, and sub-S. (2) thereof provides:

"The Standing Committee shall exercise the functions allotted to it under this Act and subject to any limitations prescribed by the Municipality especially in this behalf or generally by rules made under Cl. (a), S. 58, and to the provisions of Ss. 34. . . and 38, shall exercise all the powers of the Municipality."

These provisions are mandatory, and it does not appear that the Act contemplates the exercise of the functions of the Standing Committee by any other body, or their delegation to any one else otherwise than as mentioned in the proviso under S. 81, already referred to. It is admitted that the Lonavla Municipality had not appointed any Standing Committee for some years after it came into existence under the Act of 1925 on 8th June 1926. When they felt the difficulty of revising the assessments, after some correspondence with the Government they passed a rule which was subsequently sanctioned by Government Resolution, General Department No. 7113 of 17th January 1928. This purports to have been made under S. 58 (b) read with S. 46, Bombay City Municipalities Act 1925, and runs as follows:

"All powers or duties or executive functions to be exercised or performed on behalf of the Municipality except those which are reserved to the Municipality itself, by the provisions of the Bombay City Municipalities Act, 1925 (Bombay Act 18 of 1925), or which are conferred thereunder on the Chief Officer, are delegated to the President until rules under S. 58 (a) of the Act are sanctioned."

Purporting to act under this delegation the President appears to have disposed of the objections of all the 170 odd persons including the two appellants some time between March and July 1928. Thereupon in July a notice was given by the plaintiffs protesting that this was illegal, to which they received a reply from the President contending that everything had been legally and properly done. The learned District Judge argued on this point as follows:

"But it could scarcely have been the intention of the legislature that the Municipality should not be able to function till the Standing Committee had been appointed. As such a committee could not be appointed till rules regulating its appointment and constitution had been framed, and as this process must necessarily take some time since the new Act has recently come into operation, it must, I think, be presumed that the legislature intended that in the commencement other agencies than the Standing Committee would be able to carry on the administration of the Municipality."

I do not agree with this view. In the earlier sections of the Act provision is made for the continuance of rules and by-laws made under the former Act so far as they were not inconsistent with the new Act, S. 5. The Municipalities concerned must have been aware that the new Act was likely to be enacted, under which they would have to function and they probably had ample notice to make preparations for bringing the necessary machinery into existence, before the Act was actually applied to them. In any case, I think it cannot be assumed that the legislature intended to leave all powers to be exercised as it suited the Municipality for some indefinite period after the Act came into force. If the legislature thought it necessary to make any provisions for the transition period, it would have made some arrangement and introduced provisions of a transitory character as is done in various Acts. The learned District Judge further considered that as

no Standing Committee had been constituted, its powers and duties must be considered as remaining with the Municipality itself. This also does not appear to be a valid argument. If it were to be accepted, it would follow that it would be open to any Municipality to neglect the provisions of the Act to constitute the various statutory bodies required under it. The learned District Judge admits that if a Standing Committee had been constituted its powers clearly could not be delegated to the President. It would seem to stand on even stronger ground that if the Standing Committee has not been constituted at all the Municipality could not delegate its powers as such delegation is clearly inconsistent with the provisions of the Act. As I have already pointed out, those powers are defined by statute, and the statute is mandatory in its terms.

Section 58 of the Act, which has been invoked to justify the delegation in the present case, does not seem to confer the requisite powers. Under that section the Municipality can make rules not inconsistent with the Act for regulating the conduct of its business and the delegation of any of its powers or duties, &c. But as I have already pointed out, the delegation to the President of the powers reserved to the Standing Committee under S. 81 could not be consistent with the Act. Sub-Cl. (b) of that section refers to the making of rules not inconsistent with the Act determining the executive functions to be performed by the President, &c. The term "executive functions" is nowhere defined, but I doubt very much whether it could be extended to include a function of this character, in which a Committee is empowered to consider objections and dispose of them on general principles. Such a duty has the character more of a judicial than of an executive function. As regards S. 46, which has also been referred to, it is clear that the latter part of that section prevents any delegation of the powers conferred on the Standing Committee under S. 37. A delegation to the President of the powers of the Standing Committee under S. 81 would clearly be to the prejudice of the powers and functions of the Standing Committee. I therefore think that the resolution passed by the Municipality making a rule delegating the powers of the Standing Committee to the President was ultra vires, and did not authorize the President to dispose of the objections to the assessments as he has done. That being so, I am of opinion that the two appellants are entitled to an injunction against defendant 1, the Lonavla Municipality, preventing the said defendant from collecting the taxes on the basis of the new list from the said appellants until and so long as their objections to the assessments have not been heard and disposed of in accordance with S. 81.

Murphy, J.—The point is a very short one. The Bombay City Municipalities Act came into force at Lonavla on 8th June 1926. One of its provisions is, that with the sanction of Government the Municipality should frame rules for the constitution and powers, and set up a Standing Committee. Another proviso is, that appeals against the general assessment list shall be disposed of by the Standing Committee. By March 1928 no rules for the constitution and functions of a Standing Committee had been framed, but a new assessment list had been prepared and objections made to the assessments it contained had been received. The question therefore was what person or body should hear the objections. The Municipality framed a rule empowering the President to hear them, and he did so. The suit brought by appellants 1 and 2, wrongly in the form of a representative suit, challenged the legality of the President's proceedings. I think it is clear they were illegal. There is admittedly no specific provision justifying the procedure adopted. The learned District Judge's view was that, had there been a Standing Committee, the powers could clearly not have been delegated to the President, since in such a case the alternatives indicated are, another committee, or a Government officer or pensioner; but that since there was none, the delegation of powers can be made by the Municipality, under S. 46, to the President, notwithstanding the last paragraph of the section, which states that it must be without prejudice to the powers conferred by Ss. 37 and 38 on any committee the powers of these sections being concerned with the Standing Committee, because this provision only comes into

force when there is a Standing Committee. But this is not a fair reading of S. 46, which I think does what it purports to—empower delegation to the extent only of powers not reserved under Ss. 37 and 38—"for committees." In fact, as already pointed out by my learned brother, there were alternatives, in S. 5 read with S. 37, and even in S. 81 itself, sub S. (3).

I agree that the lower Court's decree must be set aside and one given to the appellants in the terms proposed by my learned brother. We allow costs to the appellants throughout on a valuation of Rs. 205 for all purposes. If the appellants want to recover any excess they may have paid, they must make an application to that effect to the Court concerned.

R.K. *Decree reversed.*

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* A. I. R. 1933 Bombay 179

RANGNEKAR, J.

Champaklal Mohanlal and *others*—Plaintiffs—Applicants.

v.

Nectar Tea Company—Defendants—Oppsite Parties.

Civil Revn. Appln. No. 285 of 1931, Decided on 13th October 1932, from an order of District Judge, Surat.

(a) Civil P. C. (1908), S. 20 (c)—Court at place of performance of contract can entertain suit for damages for breach of contract.

The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance completed. [P 180 C 2]

If *A* agreed at Madras to employ *B* on behalf of his business at Surat but after the agreement is made refuses to employ him or cancels the agreement, the Surat Court has jurisdiction to try the suit for damages for breach of the contract as the contract was intended to be performed in Surat, and prima facie the place of performance is the place of the breach of the contract. [P 181 C 1]

*** (b) Civil P. C. (1908), S. 20 (c)—Agreement to employ as agent—Deposit by agent as security becomes on breach of agreement as debt due to agent by employer—Agent can sue for deposit at his place of residence—Debtor and creditor.**

Where a person agrees to employ another as his agent, moneys paid by the agent as a deposit, impliedly mean that it is security for a completion of the contract and a guarantee of good behaviour and faithful performance of the obligations of the party making the deposit under the contract, and the moment the agreement is broken there is either failure of consideration or there is an equity in favour of the agent which impliedly makes the retention of the sum of the deposit a debt due by the employer to the agent. The rule that the debtor must find his creditor applies and the agent can bring a suit where he resides. [P 181 C 2 ; P 182 C 1]

H. V. Divatia—for Applicants.

T. N. Walawalkar—for Opposite Parties.

Rangnekar, J. — This application arises out of a suit brought by the plaintiffs against defendant 1, defendant 2 being formally joined as he was a partner of the plaintiffs in their business. The facts material for the purposes of this application are: The plaintiffs and defendant 2 carry on business at Surat in the name of Jolly Bros. & Sons, and on 4th November 1928 they entered into an agreement with defendant 1, who carries on business at Metupalayam in Coimbatore District in the Madras Presidency, under which the latter agreed to employ the plaintiffs as their sole agents to canvass orders for them in respect of tea and coffee in the six districts between Umergaum and Ahmedabad, including the Surat District, in the Bombay Presidency. On 10th November 1928 however the defendants by their letter of that date cancelled the said agreement. The plaintiffs therefore sued for damages for breach of the agreement and for the recovery of a sum of Rupees 500 which under the agreement they had deposited with defendant 1.

The defendants raised various defences, one of which was that the Surat Court had no jurisdiction to entertain this suit. This defence was accepted by the trial Court, which returned the plaint to be presented to the proper Court, and this order of the trial Court was confirmed in appeal by the District Judge of Surat. The plaintiffs now apply in revision of that order. The only question is, whether the Surat Court has jurisdiction to entertain the suit.

Paragraph 7 of the plaint sets out the facts showing that the Court had jurisdiction to entertain the suit. They are as follows: The work under the agreement with defendant 1 was to be performed within the jurisdiction of the Surat Court ; the amount of commission had to be paid at Surat ; the breach had resulted in damages to them which had occurred to them at Surat ; the letter of defendant 1 dated 10th November 1929 was received in Surat ; and the amount of Rs. 500 was sent from Surat and was to be received by them there.

The learned trial Judge framed an issue as to jurisdiction, and examined plaintiff 2. It may be stated here that the contract between the parties, as it appears from the agreement and correspondence put in, was brought about through the intervention of one Mr. Shroff. I am not told who this Mr. Shroff is. Plaintiff 2 who was examined by the Court on the issue had no personal knowledge of the contract. In any case there is no dispute about the following facts: that the agreement was entered into in Madras ; that the plaintiffs were to act as sole agents in the Surat District and to secure business for the defendant in that district ; and finally the sum of Rs. 475 forming part of the deposit amount of Rs. 500 was sent from Surat to the defendants.

It will be seen from these facts that the plaintiffs' claim is for a breach of an agreement on the part of the defendant company to employ them in Surat as their sole agents for the purposes of canvassing orders for tea and coffee in that district. The material terms of the agreement are that the sole agents had to furnish a fixed cash deposit of Rupees 500 to be paid to defendant 1 and this deposit was to bear 9 per cent. interest and to remain with defendant 1 for the full contract period. All the moneys realized in respect of the orders were to be sent by the plaintiffs to the defendant at Madras. Cl. 7 states:

"The sole agents shall furnish to the company monthly report of orders booked and executed showing therein the commission due to them, so as to reach the office on the last day of every month. The commission account will be verified upon the amount for all orders executed and moneys realized and paid for to the agents as they desire to do."

Clause 10 relates to the renewal of the agreement and runs as follows:

"When the agreement becomes cancelled and the agents do not like to continue to work for the company, it is essential before the settlement of the accounts of the agents that all records connected with the company, such as order books, samples, etc., or any other documents that might be in possession of the agents should be returned to the company in good order 'Railage Paid' and on due satisfaction, the deposit amount will be ordered to be refunded to the agents and accounts settled."

Clause 11 provides for payment of 9 per cent. commission on the net amount of the invoice to be paid to the agents, such amount being credited after the invoice amount was realized, and the account settled every month. Into the causes which led defendant 1 to cancel the contract it is unnecessary to enter. It is clear on these facts that the claim was in respect of damages which the plaintiffs alleged they had sustained by the wrongful breach of the agreement on the part of defendant 1, and for recovery of Rs. 500 admittedly lying with defendant 1.

Section 20 (c), Civil P. C., states that

"subject to the limitation aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—the cause of action, wholly or in part, arises."

The question is whether the cause of action in this case arose within the jurisdiction of the District Court in part, as it is conceded that the whole cause of action did not arise within such jurisdiction. "A cause of action" means, as the authorities show, "every fact which it is necessary for the plaintiff to prove in order to support his right to the judgment of the Court." In the Code of 1882 we had Expl. 3 to this section which ran as follows:

"Explanation 3.—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely :

(1) The place where the contract was made; (2) the place where the contract was to be performed or performance thereof completed; (3) the place where in performance of the contract, any money to which the suit relates was expressly or impliedly payable."

Although that explanation has been omitted from the present Code, it is nevertheless a correct statement of what the law is. Therefore performance of the contract is part of the cause of action, and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance completed. As early as 1887 this Court laid down this principle in *Dhunjisha Nusserwanji* v. *A. B. Fforde* (1). In that case Farran, J., observes as follows at p. 652:

"None of the Courts have doubted that the breach of a contract, occurring in the place where its performance has been stipulated for, constitutes part of the cause of action."

The same opinion was expressed in a still earlier case in *DeSouza* v. *Coles* (2) by Holloway, J., in this way (p. 413):

"The place at which an obligation is to be performed is its seat, and the place of jurisdiction."

1. (1887) 11 Bom 649.
2. (1868) 3 M H C R 384.

Supposing *A* in Bombay orders goods from *B* at Delhi, which the latter promises to deliver in Bombay, but after the contract *B* changes his mind and cancels the contract, it is difficult to see why a Court in Bombay has no jurisdiction, as the contract had to be performed in Bombay by delivery of the goods to *A* in Bombay. Exactly the same question arose in *Ram Lal* v. *Bhola Nath* (3), and the view taken there is the same. Similarly, if *A* agreed at Madras to employ *B* on behalf of his business at Surat, but after the agreement is made refuses to employ him or cancels the agreement, I am unable to see why it cannot be said that the Surat Court has no jurisdiction, as the contract was intended to be performed in Surat, and prima facie the place of performance is the place of the breach of the contract. In his Civil Procedure Code (Edn. 9) Sir Dinshaw Mulla at p. 104 observes:

"The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance completed,"

and he mentions several cases as authorities for this proposition. It is not necessary to refer to them. Therefore, although in this case the contract was made in Madras, even assuming the breach took place in Madras because the letter cancelling the agreement was sent from Madras, there can be little doubt that the contract was intended to be performed within the jurisdiction of the Surat Court, at least in part, and that being the case, I think the Court would have jurisdiction to try this suit. But assuming that this position is not tenable, there remains the second part of the plaintiffs' case in the suit, and that is the recovery of the amount of Rs. 500 deposited with defendant 1. Now it is clear that moneys deposited in this way, that is to say, moneys paid as a deposit, impliedly mean that it is a security for completion of the contract and a guarantee of good behaviour and faithful performance of the obligations of the party making the deposit under the contract. Now here the plaintiffs' case is that the agreement was wrongfully put an end to by defendant 1, and on that case it must follow that this amount becomes a debt received by defendant 1 to the use of the plaintiffs. If therefore it is a debt for money received to the use of another, then the question would be whether a suit to recover such a debt can be brought in Surat where the creditor resides. In the case of *Phillips* v. *London School Board* (4), Lord Mansfield is quoted as observing:

"When the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render a receipt by the defendant to the use of the plaintiff, an action for money had and received may be maintained."

The debt thus used to be a charge technically in England as moneys received by the defendant to the use of the plaintiff. Apart from this there is another aspect as to the nature of this debt, and I see no answer to it. The principle of law is that unless the right is excluded by the terms of the contract, money paid for consideration which fails may be recovered back as a debt for moneys received by the defendant to the use of the plaintiff. It was held in *Ashpitel* v. *Sercombe* (5) that money paid as a deposit upon applications for shares in a projected company, which is afterwards abandoned, may be recovered back from the promoters or directors who received the money. If then it is a debt for money received, whether because the defendant on breach of the agreement had no right to retain it and the money in law and justice belonged to the plaintiffs, or as a debt on failure of consideration, the relationship, then, that arises between the plaintiffs and the defendant would be that of creditor and debtor. S. 49, Contract Act, deals with the place of performance, and the principle laid down there is that where no place is fixed for the performance of the promise, it is the duty of the debtor to apply to the creditor to appoint a reasonable place for the performance of the promise and to perform it at such place. If the debtor fails to apply, then, as pointed out by the Judicial Committee of the Privy Council in *Soniram Jeetmull* v. *R. D. Tata & Co.* (6), the law that would apply would be the law in England on the principle that the debtor must find his creditor. Their Lordships observe at p. 271 (of 54 *I. A.*):

3. A I R 1920 All 6=59 I C 359=42 All 619.

4. (1898) 2 Q B 447=67 L J Q B 874=14 T L R 501=46 W R 658=79 L T 50.

5. (1850) 5 Ex 147.

6. A I R 1927 P C 156=102 I C 610=54 I A 265=5 Rang 451 (PC).

"Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that S. 49, Contract Act, gets rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him."

In this case admittedly there is no indication appearing on the face of the contract or in the evidence or other circumstances of the intention of the parties where on breach of the agreement the deposit was to be returned. But the plaintiffs, however, allege in the plaint, and that statement has been overlooked by both the Courts below, that as soon as they received the defendant's letter the plaintiffs called upon defendant 1 to return the sum of Rs. 500. That being the case, it is clear, the creditor, that is to say, the plaintiffs in this case, appointed Surat as the place for the performance of the contract. But supposing that no place was appointed, it can hardly be contended that a man residing at Surat would fix Madras as the place of performance for the return of Rs. 500, and on the principle to which I have referred it must follow that it would be the duty of defendant 1 to return the sum of Rs. 500 to the plaintiffs at Surat. I am unable to accept the view taken by the lower Courts that this amount was a deposit and not a debt and that therefore the rule that the debtor should find his creditor did not apply. As I have shown above, the moment the agreement is broken there is either failure of consideration or there is an equity in favour of the plaintiffs, which impliedly makes the retention of the sum of Rs. 500 a debt due by defendant 1 to the plaintiffs. In this view, therefore, I think the order made cannot be sustained, and the rule must be made absolute. Case sent back to the trial Court for trial on the merits Opponent 1 to pay the costs of the petitioner of this application. Costs in the lower appellate Court and costs in the trial Court will be costs in the cause.

R.K. *Case remanded.*

A. I. R. 1933 Bombay 182

MIRZA, J.

Dharamdas Kachudas and *another*—Plaintiffs.

v.

Kachudas Makanji—Defendant.

Original Civil Suits Nos. 1736 of 1931 and 1937 of 1932, Decided on 16th January 1933.

Legal Practitioner—Attorney—Change of —Non payment of costs—Attorney has lien only and cannot insist on his being retained.

It is the primary right of every litigant to employ any attorney he likes and to change him for another attorney in the course of the same proceeding if he so wishes, provided that he does not thereby cause delay or injustice to any other party or inconvenience to the Court. If he has not paid costs to the attorney whom he wishes to discharge that would affect his right to obtain papers and documents on which the attorney might claim a lien for his unpaid costs. But it is not open to an attorney to say that his client shall continue to employ him in the suit or proceeding until all the costs due to him are paid: *A I R* 1932 *Bom* 363, *Wadia, J., Diss. from.* [P 183 C 1, 2]

Banaji—for Plaintiffs.

Mirza, J.—These are two applications (1) by the next friend of the minor plaintiff in the first suit, and (2) by the same person as guardian ad litem of the same minor as defendant 2 in the second suit, for a change of attorney order. The application was first made before me on 12th January 1933 when an order drawn up in the usual form followed in the Prothonotary's office was presented before me for approval and fiat. On that occasion the former attorneys, Messrs. Damania & Co., appeared by counsel and objected to the order being made. Thereupon the matter was transferred to counsel's list for today and has again come up before me. The order which was sought on 12th January 1933 in each case included this provision:

"That the said Messrs. Damania & Co. do deliver over to the said Messrs. Kharas & Co. all documents, vouchers and proceedings whatsoever relating to the said suit as are in their possession or power on payment of their taxed costs."

It is conceded on behalf of the applicants that they would not be entitled to obtain an order in this form as the attorney can claim to have a lien on the papers and documents in his possession not only for the costs of the particular suit or suits to which they relate but also for the costs of all other matters in which the attorney has been employed. On 13th January 1933 the new at-

torneys Messrs. Kharas & Co. wrote to the former attorneys Messrs. Damania & Co. inter alia as follows:

"We cannot understand what possible objection you can have to our obtaining the said orders without making any reference in them for delivery of papers to us. We therefore propose that at this stage we should only obtain orders merely for substituting ourselves in your place. As for the delivery of papers in the various matters you can urge whatever objection you have at the time when we ask for such delivery. In our submission you are not entitled to object to an order merely for change of attorneys. We have drawn up the proposed orders deleting all reference to delivery of papers and have to ask you to consent to the same being signed by the Prothonotary. We send you herewith copies of the proposed orders engrossed by us. We have to give you notice that if you decline to give such consent and we are compelled to appear before the Court on Monday next we shall hold you responsible for all the costs and consequences."

It is urged on behalf of the former attorneys that the applicants are not entitled to a change of attorney order until they have paid all the costs due by them to the former attorneys. For this contention reliance is placed upon an observation of Wadia, J., in *Narandas Sundarlal* v. *Narandas Harbhat* (1), where the learned Judge has said (p. 708 of 34 *Bom. L. R.*):

". . . it is a rule of the Court not to sanction a change of solicitors when the former solicitor has not discharged himself, so long as his costs remain unpaid."

With great respect to the learned Judge no such rule, so far as I am aware, has existed in this Court. I am informed by my Registrar that the practice in the Prothonotary's office is to allow change of attorney orders without insisting on costs due to the former attorneys being paid as a condition precedent. The learned Judge probably relied upon an observation of Sale, J., in *Basanta Kumar Mitter* v. *Kusum Kumar Mitter* (2), which is as follows (p. 769):

"Moreover, it is the rule of this Court to decline to sanction a change of attorney where the former attorney has not discharged himself so long as his costs remain unpaid."

This observation has reference possibly to the then practice in the Calcutta High Court and cannot apply to our High Court. In my opinion it is the primary right of every litigant to employ any attorney he likes and to change him for another attorney in the course of the same proceeding if he so wishes, provided that he does not thereby cause delay or injustice to any other party or inconvenience to the Court. If he has not paid costs to the attorney whom he wishes to discharge that would affect his right to obtain papers and documents on which the attorney might claim a lien for his unpaid costs. In my judgment it is not open to an attorney to say that his client shall continue to employ him in the suit or proceeding until all the costs due to him are paid. The object of the rule requiring a change of attorney order, so far as I can apprehend, is to enable the Prothonotary's office conveniently to know when the liability of the discharged attorney on behalf of his client to pay court-fees and other accruing charges to that office ceases and that of the newly appointed attorney in that behalf begins. The converse case of the attorney being required to conduct the suit or proceeding on behalf of his client has no application as the attorney cannot be allowed to prejudice his client's case or proceeding by refusing to act for him for want of sufficient advances unless he discharges himself on his own application by an order of the Court from acting as attorney for the client, for in the latter case the attorney would disentitle himself from withholding from his client for the purposes of the suit or proceeding then pending, the papers and documents on which the attorney has a right of lien for his unpaid costs. The observation of Wadia, J., is in the nature of obiter as would appear from the judgment. I am unable, with great respect, to accept the same as correct. The application will be allowed with costs. Counsel certified. As for the previous appearance before me, on 12th January 1933, the former attorney will have his costs of that day but counsel will not be certified.

R.K. *Application allowed.*

1. A I R 1932 Bom 363=138 I C 257=34 Bom L R 703.
2. (1900) 4 C W N 767.

A. I. R. 1933 Bombay 183

BAKER, J.

Narayan Rayaji—Appellant.

v.

Rango Ramchandra—Respondent.

Appeal No. 47 of 1931, Decided on 7th December 1932, against order of First Class Sub-Judge, Dharwar.

Civil P. C. (1908), O. 47, R. 7 and O. 43, R. 1 (w)—Insufficiency of court-fee stamp is no ground of appeal against review.

Where once a Judge has granted the application for review, on whatever grounds he has granted it, the appeal against it can only be made under the conditions laid down in O. 47, R. 7 and as the question of the application for review being insufficiently stamped is not one of the grounds mentioned in O. 47, R. 7 as being a proper ground for an objection, the appellate Court cannot go into the question of whether the court-fee paid was sufficient or not : *A I R* 1927 *Bom* 599 and *A I R* 1929 *Bom* 183, *Rel on.* [P 185 C 1]

B. A. Jahagirdar—for Appellant.
S. R. Parulekar—for Respondent.

Baker, J.— This is an appeal against an order by the First Class Subordinate Judge of Dharwar, granting a review of an order made determining mesne profits in execution proceedings. The facts are that the plaintiff obtained a decree for partition in 1922 awarding him a one-third share in the property with mesne profits, which was confirmed by the High Court in 1925. In 1927 the plaintiff applied to the lower Court to determine the mesne profits under O. 20, R. 12. The defendant put in a written statement. Certain issues were framed, evidence recorded, and the Subordinate Judge determined the amount due for mesne profits in July 1930. But a month later the amount found due was corrected and reduced by about Rs. 300 on the ground that there had been a miscalculation. Thereafter the defendant applied for a review of the order on the ground that the lower Court did not take into consideration several of the points which were alleged in his written statement and the purshis which had been put in by him. This application was filed on an eight anna stamp, and was stated to be either for review or under S. 151, Civil P. C. The judgment-debtor wanted to set off the sum of Rs. 3,832 as against the mesne profits which had been found due from him. This application for review was granted. The judgment-creditor has appealed on the ground that the application for review was insufficiently stamped, and on certain points which affect the merits.

A preliminary objection has been taken by the respondent that no appeal lies, inasmuch as by the rules framed by this High Court, O. 43, R. 1, Cl. (w), has been repealed, and an appeal against an order granting a review will only lie under the provisions of O. 47, R. 7. It is admitted that this is so, and the point has been made clear in *Kunversi* v. *Pitambardas* (1), followed in *Shidramappa* v. *Gurushantappa* (2). In the Presidency of Bombay an appeal from an order granting a review can lie only on the grounds mentioned in O. 47, R. 7, Civil P. C., since O. 43, R. 1, Cl. (w), has been repealed by the Bombay High Court.

It is contended that the present appeal does not fulfil any of the conditions of O. 47, R. 7, which only provides for an appeal on the ground that the application was in contravention of the provisions of R. 2 or R. 4, O. 47, or was made after the expiry of the period of limitation, none of which apply. R. 2 refers to applications for review of a decree or order of a Court, not being a High Court upon some ground other than the discovery of such new and important matter or evidence as is referred to in R. 1, or the existence of a clerical or arithmetical mistake or error being made only to the Judge who passed the decree. Admittedly this application was made to the same Judge, so R. 2 does not apply. R. 4 refers to notice being given to the opposite party, which has been done in this case; and R. 4 too does not apply. Also there is no question of limitation. Hence the appeal would not lie. The learned advocate for the appellant concedes that ordinarily speaking an appeal would lie only under the provisions of O. 47, R. 7 and that the present appeal does not conform with the requirements of that rule, but he contends that the application for review is not really an application for review at all, because it is not correctly stamped as provided by Sch. 1, Arts. 4 and 5, Court-fees Act 1870, by which the fee payable on an application for review is the same as that on the plaint or the memorandum of appeal, or half of it if it is made within a period of ninety days, as the present application was, and he contends that inasmuch as the fee leviable is ascertainable, for the amount awarded by the Court in its order was Rs. 5,875, and the judgment-debtor now wants relief in respect of Rs. 3,832, the amount of court-fee payable would be on half the amount awarded. And as no court-fee was paid

1. A I R 1927 Bom 599=107 I C 50.
2. A I R 1929 Bom 183=116 I C 227.

the present application for review is a nullity. That is a contention which should have been and was as a matter of fact taken when the application for review was presented. The Judge has dealt with it in his judgment as a preliminary issue, and he finds that the court-fee paid is sufficient and proper, and subsequently on the merits he granted the application for review. Now whether the finding of the lower Court that the court-fee paid is proper is right or wrong, and on reference to the cases on which he relies, I think it is almost certainly right, that makes no difference, because once he has granted the application for review, on whatever grounds he has granted it, the appeal against it can only be made under the conditions laid down in O. 47, R. 7, and the question of the application for review being insufficiently stamped is not one of the grounds mentioned in O. 47, R. 7 as being a proper ground for an objection. I am therefore of opinion that the present appeal would not lie, because O. 47, R. 7 is a bar to it, and therefore we cannot go into the question of whether the court-fee paid was sufficient or not. That is a question which was considered by the lower Court and decided by it. The result is that the appeal must be dismissed with costs.

R.K. *Appeal dismissed.*

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* A. I. R. 1933 Bombay 185

MURPHY AND BROOMFIELD, JJ.

Charles S. Brown—Applicant.

v.

Albert Donough Hanson — Opposite Party.

Civil Revn. Appln. No. 421 of 1931, Decided on 2nd December 1932, from an order of Extra Joint Sub-Judge, Poona, in Darkhast No. 1884 of 1930.

(a) Civil P. C. (1908), Ss. 47 and 115 and O. 21, R. 48—Order refusing attachment of pay under O. 21, R. 48—No revision lies.

Where the decree-holder wants to execute his decree by attachment of the pay of the judgment-debtor under O. 21, R. 48, the question whether it is possible to execute the decree in the manner which has been adopted by the executing Court is primarily a question in execution and one which must be dealt with and decided under S. 47 and the order made by the Subordinate Judge is one in which an appeal is competent and therefore one which is excluded from the purview of the High Court in revision by S. 115. [P 186 C 2]

*** (b) Civil P. C. (1908), S. 60 (1) (i)—First Class Warrant Officer—Pay of, is not attachable.**

The pay of the First Class Warrant Officer to whom the Army Act applies is not attachable under a decree of a civil Court even to the extent contained under S. 60 (1) (i): *A I R* 1919 *Bom* 138, *Rel. on.* [P 185 C 2]

H. C. Coyajee and *S. G. Patwardhan* for *A. G. Sathaye*—for Applicant.

P. B. Shingne—for Opposite Party.

Murphy, J.—The point we have to decide is, in the first place, whether this revision application is one which can properly be made to this Court, and, secondly, whether the lower Court's order, which was one made in execution proceedings, and holding that the pay of a First Class Warrant Officer to whom the Army Act applies is not attachable under a decree of the civil Court to the extent contained in S. 60 (1) (i), Civil P. C., is correct or not. Mr. Brown, the decree-holder, had a decree against the judgment-debtor for Rs. 4,680 and costs. He applied in execution of this decree, seeking to have a moiety of the defendant's pay attached by the issue of an order under O. 21, R. 48, Civil P. C. An order accordingly issued and went apparently to the Controller of Military Accounts, Rawalpindi. That officer, in the first instance, sent a cheque for Rs. 236-1-0, but protested that the judgment-debtor's salary was not attachable in this way. There was some correspondence between the learned Subordinate Judge and the Military Authorities, in the course of which arguments were advanced on either side, and in the end, the learned Government Pleader, Poona, was instructed to appear for the judgment-debtor through the Military Authorities. The learned Subordinate Judge held that the judgment-debtor's pay was not attachable in the manner which had been had recourse to, and dismissed the application for execution, raised the attachment and directed the plaintiff to refund to the applicant, or to deposit in Court, the amounts of Rs. 236-1-0 and Rs. 247-1-0 which had been, as he held, wrongly paid to him, within a week from that date, and also ordered that a further amount of Rs. 507-2-0 lying in Court should be returned to the judgment-debtor. The decree-holder was ordered to pay the latter's costs and to bear his own,

We have had two arguments addressed to us, and the first was on the question of whether this order of the learned Subordinate Judge is one that we can revise or not. It has been urged that there is an error of jurisdiction in that the learned Subordinate Judge was not competent to revise his order attaching the judgment-debtor's pay, and that he committed a material irregularity in allowing an unauthorized person to appear and contest the judgment-debtor's claim. As to the first point we think that the learned Subordinate Judge did not review his first order. What happened was that the application for execution being made within a year of the decree, no notice to the judgment-debtor was necessary, and an order to execute the decree was made in the ordinary way ex parte. When the prohibitory order arrived at Rawalpindi and the Military Authorities deducted Rs. 236 from the judgment debtor's pay, he protested to them, and the question seems to have been considered by them and his protest was forwarded through the usual official channels to the Subordinate Judge's Court, Poona. Ultimately on the Subordinate Judge saying that the judgment debtor should appear in person or by pleader, and not argue through the post, arrangements were made for his being properly represented before the learned Subordinate Judge by the Government Pleader and arguments were heard and the matter was decided. As far as we can see, there was no question of an order being reviewed at all. An ex parte order to execute had been made, and in due course, there being an objection, this was heard and decided by the learned Subordinate Judge.

The second point is purely a technical one. It is, that the Military Authorities should not have been heard at all in the matter. But they were the persons to whom the prohibitory order went, and they were, in fact, representing the judgment-debtor, who, in the end, was properly and legally represented through them by the Government Pleader. We think that no material irregularity vitiated the proceedings so far. There remains to be considered, whether, on these facts, the application, which has been made to us, is competent or not. It appears that the applicant's legal advisers were in some doubt as to this point, for an appeal was simultaneously lodged in the District Court, Poona. We are told that it has since been dismissed for failure to pay process fees. The proceedings before the learned Subordinate Judge were evidently proceedings in execution. The applicant was executing his decree, and the question to be decided between the parties, who, as I have already said, were sufficiently represented as to the judgment-debtor's side, was, whether it was possible to execute this decree in the manner which has been adopted by the executing Court. This was primarily a question in execution and one which must be dealt with and decided under S. 47, Civil P. C. This being so, the order made by the learned Subordinate Judge was one in which an appeal was competent, and therefore one which is excluded from the purview of this Court in revision by S. 115, Civil P. C., which runs:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto."

Since, in our opinion, the applicant has not adopted the proper remedy, and his application to us does not lie in the form in which it has been made, it is really unnecessary to go into the merits of the matter. But, since we have heard a considerable argument on the point, I think I had better summarize our views shortly. Mr. Coyajee's argument was that the judgment-debtor here is included in the special case under S. 60 (i), and that he comes within the definition of a "public officer" as defined in S. 2 (17) of the Code. S. 2, Cl. (17) (c), says:

"Every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government."

The interpretation section of the Army Act, S. 190 (4), defines "officer:"

"The expression 'officer' means an officer commissioned or in pay as an officer in His Majesty's forces, or any arm, branch, or part thereof . . ."

It also includes certain other persons with whom we are not now concerned. Sub-S. (6) defines the word "soldier:"

"The expression 'soldier' does not include an officer as defined by this Act, but with the modifications in this Act contained in relation to warrant officers and non-commissioned officers does include a warrant officer and a non-commissioned officer, and every person subject to military law during the time that he is so subject:"

By the definition, the judgment-debtor being admittedly a first class warrant officer, is excluded from the expression "officer" in the first definition, and the argument here has been that the expression "in pay" in the definition of officer brings him in, as a Second Lieutenant's pay is Rs. 425, while the judgment-debtor's pay is said to be Rs. 500. But, we do not think that this interpretation of the definition is open to us. The second line of argument taken up is that the expression "public officer" would include him, since, it appears, that he is a gazetted officer. Whether he is a gazetted officer or not, we are not certain. Apparently the appointment which he holds is of the character of appointments which are gazetted in the Gazette of India, and the probability is that he is a gazetted officer, though we have been unable to find a definition of that expression. But, we think that, in any case, his being a gazetted officer would not affect the question of his liability. The contention is worked out in the following way: By S. 136, Army Act:

"The pay of an officer or soldier of His Majesty's regular forces shall be paid without any deduction other than the deductions authorized by this or any other Act or by any Royal Warrant for the time being, or by any law passed by the Governor-General of India in Council."

The Civil Procedure Code being a law passed by the Governor-General-in-Council, it is an authority by which deductions from the pay of an officer or soldier of His Majesty's regular forces may be made, and therefore that the order under O. 21, R. 48, is legal and effective. On the other hand, it has been contended that notwithstanding anything in S. 136, S. 144, Army Act, bars any deductions being made in the pay of a soldier by proviso (1) to that section:

"Any person having cause of action or suit against a soldier of the regular forces may, notwithstanding anything in this section, after due notice in writing given to the soldier, or left at his last quarters, proceed in such action or suit to judgment, and have execution other than against the person, pay, arms, ammunition, equipments, regimental necessaries, or clothing of such soldier."

This provision explicitly bars execution against a soldier. In the parallel case of *Duckworth* v. *Duckworth* (1), a similar question arose in respect of an Assistant Surgeon, who was a first class warrant officer, as in this case. The learned District Judge refused to make an order under O. 21, R. 48, and a Bench of this Court held that his refusal was justified, on the ground that the judgment-debtor in that case fell within the definition of a soldier in the Army Act, and under S. 145 of that Act. Their Lordships' reasoning is summarized by Macleod, J., who says (p. 375 *of* 43 *Bom.*):

"The respondent, an Assistant Surgeon in the Indian Medical Service, is a Gazetted Officer and therefore a public officer, so that prima facie his pay and allowances would be liable to attachment to the extent of one-half under S. 69, Civil P. C. But he is also a first class warrant officer and is therefore a 'soldier' as defined by S. 190, Army Act. Under S. 145 (2) of that Act an order has been made by the Commander-in-Chief that a sum of 1s. 6d. per diem, the maximum allowed, should be deducted from the respondent's pay in respect of the alimony and maintenance awarded to the appellant for herself and her three children by the District Judge, Ahmednagar. I agree with the learned Chief Justice that we must hold that in this case the Army Act prevails over the Civil Procedure Code."

Their Lordships' reasons for holding that the Army Act prevailed over the Civil Procedure Code are given in the learned Chief Justice's judgment in that case. Briefly put, they were that, notwithstanding any specific provisions being repealed, the terms of S. 4 of the Code had the same effect, and that the special law applicable to the then defendant overrode the provisions of the general law under S. 60 (i). We do not think it necessary to refer to the other cases quoted in the course of the arguments. We can see no distinction between the bar contained in S. 145 (2), Army Act, and that contained in S. 144, and we think that the facts are covered by the judgment of the Division Bench. We find against the applicant on the merits as well. The rule will be discharged with costs.

R.K. *Rule discharged.*

1. A I R 1919 Bom 133=50 I C 427=43 Bom 368.

A. I. R. 1933 Bombay 187

BAKER AND RANGNEKAR, JJ.

Raghunathdas Harjivandas — Appellant.

v.

District Superintendent of Police, Nasik—Respondent.

First Appeal No. 511 of 1927, Decided on 7th November 1932, from decision of Dist. Judge, Nasik.

Land Acquisition Act (1894), Ss. 54 and 30—Order of apportionment is appealable though not as award but as decree.

Though the order determining the apportionment of the compensation is not an award within meaning of S. 54 it is certainly a decree or of the nature of a decree and an appeal lies against it : *A I R* 1922 *P C* 80, *Expl. and Rel on.* ; *A I R* 1929 *Mad* 351, *Foll.* [P 188 C 2]

Nilkanth Atmaram—for Appellant.

B. G. Rao—for Respondent.

Baker, J. — A preliminary point is taken by the learned Assistant Government Pleader for the respondent, the Secretary of State, in this appeal that no appeal lies. The appeal relates to the apportionment of compensation for certain land acquired in Nasik, and it is contended that under S. 54, Land Acquisition Act, no appeal will lie against an order passed in respect of the apportionment of compensation in a reference under S. 30 of the Act. The learned Assistant Government Pleader has based his argument first on the fact that under S. 39 of the old Act there was a distinct section referring to the right of appeal against an order apportioning compensation, which does not exist in the present Act, and secondly on the ruling of the Privy Council reported in *Ramchandra Rao* v. *Ramchandra Rao* (1), and it is contended that the Privy Council have held in that case that the term "award" can only include an order regarding the amount of compensation to be paid for the land acquired and that any order regarding apportionment amongst persons interested is not an award. At p. 970 (*of* 24 *B. L. R.*), of that judgment it is stated as follows :

"The award as constituted by statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under S. 31 (2) the functions of the award have ceased; and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award. . . . ."

On a careful examination of the judgment of the Privy Council however it does not appear that any decision was arrived at that no appeal lies from the decision determining the rights of various rival candidates to the whole or part of the award. The point which arose before the Privy Council in that case was of a different nature, and, although the order determining the apportionment of the compensation is not, in view of the Privy Council ruling, an award within the meaning of S. 54, Land Acquisition Act, that only means that it is not governed by the provisions regarding appeal contained in the latter part of that section. It does not mean that there is no appeal against it. Even in the judgment under reference the Privy Council says (p. 970 *of* 24 *B. L. R.*) :

" . . . . it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal which would be wholly taken away when the piece of land was represented by a sum of money paid into Court."

The provisions of S. 54, Land Acquisition Act, are subject to the provisions of the Code of Civil Procedure 1908, and, although the order determining the rights of the parties is not, in view of the Privy Council judgment, an award, it is certainly a decree or of the nature of a decree and an appeal would lie against it. That is the interpretation which has been put on the Privy Council judgment in *Venkatareddi* v. *Adinarayana Rao* (2). It would be extraordinary if, without special words to that effect, the legislature had deprived the parties, who dispute the apportionment of the compensation of the appeal which they had under S. 39 of the old Act. That section corresponds to the present S. 54, and, as the Privy Council have pointed out, so far as the award, which means the amount of compensation is concerned, there are special provisions for an appeal in that section the dispute as regards apportionment being governed by the ordinary law. I am therefore of opinion that there is no bar for an appeal under S. 54, Land Acquisition Act, and that the appeal should be heard on the merits.

Rangnekar, J.—I agree. In support of the preliminary objection the learned Assistant Government Pleader relied upon : (1) S. 54, Land Acquisition Act, (2) the Privy Council decision in *Ramchandra Rao* v. *Ramchandra Rao* (1), and (3) certain amendments made in the present Act. Taking the first contention it seems to me as a matter of construction of S. 54, Land Acquisition Act,

1. A I R 1922 P C 80=67 I C 408=49 I A 129 =45 Mad 320=24 Bom L R 963 (P C).

2. A I R 1929 Mad 351=119 I C 42=52 Mad 142.

that a special right of appeal is given in cases of an award or part of an award, but that the rights of litigants in proceedings under the Land Acquisition Act, relating to what the Act calls apportionment, are expressly saved by the first sentence in that section. If this is correct, then the only question is whether a decision as to rival claims to the amount of compensation awarded is a decree or not. This brings me to the second point. The answer to the question which I have raised is to be found in the case on which Mr. Rao relies. A careful perusal of the decision makes it clear that a decision on a disputed question of title between rival claimants as regards the amount of compensation is a decree appealable in the ordinary manner laid down in the Civil Procedure Code. The Privy Council case, speaking for myself, seems further to indicate that if a party against whom an adverse decision is made as regards the question as to his title to receive either the whole or a portion of the compensation does not appeal from such decision in the ordinary way, that decision would operate as res judicata in any subsequent litigation that may be started as regards the same question between the same parties or parties claiming through or under them. The facts in that case were that a Hindu had settled certain property on his wife. Part of that property was acquired in 1894 and the question arose as to whether the widow claiming under the settlement was entitled to an absolute estate in the compensation money or whether under the terms of the settlement deed she took only a widow's estate.

It is clear from the arguments and the report of the case that the question arose in proceedings under the Land Acquisition Act. The matter came before the District Court of Tanjore. The District Judge held that the widow took an absolute estate. An appeal to the High Court from that decision by the opposite party resulted in a reversal of the decision of the District Judge, the High Court holding that she took only a limited estate. No further proceedings were taken thereafter. In 1916, long afterwards, the reversioners raised the same question by an independent suit and obtained a decision in their favour in the trial Court which was reversed by the High Court which this time held that under the terms of the deed the widow took an absolute estate. In the appeal to the Privy Council the principal question was whether the decision in the earlier litigation commenced under the provisions of the Land Acquisition Act, was res judicata on the question as regards the interest of the widow under the settlement deed and, their Lordships observed that in their Lordships' opinion the decision given in 1897 by the High Court at Madras was a clear and complete determination as between the parties to that suit and those claiming under them, which the present litigants could not dispute. It seems to me that the Privy Council decision shows clearly that a decision on the question of the respective interests of the claimants in the compensation awarded under the Act is a decree appealable in the ordinary way.

Now, there is a clear distinction between an award and a decree. It is only to make that position clear and to state that the award ranks as high as a decree that the amendment on which Mr. Rao relies seems to have been made in the present Act by sub-S. 2, S. 26. That subsection says that an award shall be deemed to be a decree. I am not disposed to attach much importance to the last argument of Mr. Rao that the specific provisions as regards right of appeal in apportionment cases given by the earlier Act no longer find a place in the present Act and for the simple reason that it appears that in the old Act by two separate sections rights of appeal were given in the matter of an award and also against orders apportioning the compensation amount between the claimants. Certain other provisions of the Civil Procedure Code were made applicable by a different section. All this has been now done away with and the same result has been achieved by the opening words of S. 54. In my opinion therefore the Privy Council case on which Mr. Rao relies, instead of supporting his contention, really goes against it. This view is further supported by a decision of the Madras High Court in *Venkatareddi* v. *Adinarayana Rao* (2). For the reasons I agree that the preliminary objection must be overruled. (The appeal was then dismissed with costs on merits).

R.K. *Appeal dismissed.*

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BEAUMONT, C. J. AND MURPHY, J.

Trimbak Tumdushet Rangari—Defendant—Appellant.

v.

Ziparu Chaturdas Bairagi—Plaintiff—Respondent.

Second Appeal No. 1059 of 1930, Decided on 31st October 1932, from decision of Dist. Judge, Nasik, in Appeal No. 237 of 1929.

*** Civil P. C. (1908), O. 21, R. 63—Objection dismissed on ground of unnecessary delay—Still suit must be brought within one year—Limitation Act (1908), Art. 11.**

When an objection to execution proceedings is dismissed under the proviso to O. 21, R. 58, as being made after unnecessary delay, the order rejecting the claim is an order made against the claimant within O. 21, R. 63, and the time within which to bring suit to establish the applicant's claim is limited to one year by Art. 11, Lim. Act: 41 *Mad* 985 (*F B*); 45 *Cal* 785 and *AIR* 1923 *All* 435, *Foll.* [P 190 C 1, 2; P 191 C 1]

H. M. Choksi—for Appellant.

S. Y. Abhyankar—for Respondent.

Beaumont, C. J.—This is a second appeal from a decision of the District Judge of Nasik raising a short point of law which has come before the other High Courts in India, but does not appear to have come before this Court. The point of law is whether, when an objection to execution proceedings is dismissed under the proviso to O. 21, R. 58, as being made after unnecessary delay, the order rejecting the claim is an order made against the claimant within O. 21, R. 63. If the order does fall within R. 63 then the time within which to bring a suit to establish the applicant's claim is limited to one year by Art. 11, Lim. Act. The facts giving rise to the question are not in dispute. A money decree was obtained in 1917 against one Tanaji and on 28th June 1918 Tanaji sold Survey No. 84/1, the property in suit, to the defendant. Execution proceedings were then taken under the decree of 1917 and in 1920 an undivided one-fourth of Survey No. 84/1 was purchased by the plaintiff in those execution proceedings. On 7th July 1919 the defendant, knowing about those execution proceedings, filed an application to raise the attachment, and on 22nd January 1920 that application was dismissed under the proviso to R. 58, O. 21.

The actual terms of the order of 22nd January 1920 were "Application rejected. Costs on applicant." O. 21, R. 58, so far as material, provides that where any claim is preferred to, or any objection is made to, the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects as if he was a party to the suit : Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

It was under that proviso that the order of 22nd January 1920 was made. Then R. 59, O. 21, contains provisions as to the evidence to be adduced on a claim under R. 58; and Rr. 60, 61 and 62 contain provisions as to an investigation made under R. 58. Then R. 63 provides that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive. Then Art. 11, Lim. Act, provides that the claim by a person against whom inter alia the following order has been made to establish the right which he claims to the property comprised in the order, namely, an order under the Civil Procedure Code, 1908, on a claim preferred to or an objection made to the attachment of property attached in execution of a decree, must be brought within one year from the date of the order. So that, if this order of 22nd January 1920 is an order made against the claimant within R. 63, he must bring his suit within a year, and admittedly he did not bring this suit within that period.

On the language of R. 63, apart from authority, it seems to me difficult to see why an order dismissing the claimant's application with costs is anything but an order made against the claimant. Mr. Choksi for the appellant has contended that the only order referred to in R. 63 is an order made upon an investigation of the claim made under R. 58. If that was the intention of R. 63 it would have been easy so to provide. Not only has the legislature not so provided, but they have adopted language in R. 63 different from the language of S. 283 of the older Code which R. 63 replaced,

under which section the appellant's claim would have been right. S. 283 was confined to orders made under the three preceding sections which corresponded to Rr. 60, 61 and 62, O. 21, whereas under R. 63 the language is perfectly general; it is not confined to orders made under the three preceding rules, but covers any order made against the party making the claim. Mr. Choksi contends that that inflicts a hardship on his client, which could not have been intended by the legislature. Even if a hardship were inflicted we could not do otherwise than give effect to the plain language which the legislature has used. But I am not satisfied that in fact there is any material hardship.

The claimant in this case, objecting to an attachment being levied on the property which he claimed to have purchased, was not bound to avail himself of the procedure provided in O. 21, R. 58. If he had not availed himself of that procedure, he would have had the normal period of twelve years in which to bring his suit. Having availed himself of that procedure he must be taken to have known that if his claim failed he would have only one year in which to bring his suit, and it does not seem to me to matter much whether the claim failed on its merits, or on the ground that it was presented after undue delay. In either case the claimant knew when he presented his claim and adopted the procedure under O. 21, R. 58, that his period of limitation would be limited to one year after an order made against him. This view is in accordance with the view taken by the other High Courts. I would refer particularly to the decision of the Full Bench of the Madras High Court in *Venkataratnam* v. *Ranganayakamma* (1), the decision of the Calcutta High Court in *Nagendra Lal* v. *Fani Bhusan Das* (2) and the decision of the Allahabad High Court in *Gobardhan Das* v. *Makundi Lal* (3). With all those decisions I respectfully agree. I think therefore that the decisions of the lower Courts were right and that the appeal must be dismissed with costs.

Murphy, J.—I agree.

R.K. *Appeal dismissed.*

1. (1918) 41 Mad 985=48 I C 270 (F B).
2. (1918) 45 Cal 785=44 I C 265.
3. A I R 1923 All 435=45 All 438=74 I C 1024.

A. I. R. 1933 Bombay 191

PATKAR AND BARLEE, JJ.

Shamji Rakhama Patil and *others*—Appellants.

v.

Mahadeo Sadashiv Patil and *others*—Respondents.

Second Appeal No. 468 of 1928, Decided on 11th November 1932, from decision of Dist. Judge, Nasik, in Appeal No. 112 of 1926.

Co-operative Societies Act (1912), S. 42—Member's liability—It can be enforced only by winding up and not by suit.

No doubt the members of a co-operative credit society are subject to a statutory liability to contribute to the debts of the society; but that liability can only be enforced by the procedure of winding up contained in the Act, and not directly by suit of a creditor even after the cancellation of the society: *A I R* 1931 *Pat* 321 (*F B*), *Foll.* [P 194 C 2]

A. G. Desai and *T. N. Walawalkar*—for Appellants.

G. N. Thakor, *W. B. Pradhan* and *P. S. Bakhle* for *S. Y. Abhyankar* and *V. N. Chatrapati*—for Respondents.

Patkar, J.—It is necessary to state the facts which led to the present litigation. The Daregaon Co-operative Credit Society, of which the plaintiffs, the defendants, and others were members and Shravan Shamji was Chairman, executed an agreement with the Malegaon Municipality to purchase and remove the manure for five years at the rate of Rs. 2,500 for 1916-17 and Rs. 100 in addition for each subsequent year. The plaintiff and defendant 1 were sureties of the society for the due performance of the agreement. The contract was carried out for some years and was subsequently broken on 1st October 1918. The Malegaon Municipality thereupon brought Suit No. 304 of 1921 against Shravan Shamji, the plaintiff, defendant 1, and the liquidator representing the co-operative society. On 21st November 1922 a decree was passed awarding the plaiutiff's claim against the society as regards its property represented by the liquidator and against defendant 1 and the plaintiff. The claim was dismissed as against the Chairman. In the liquidation proceedings the liquidator recovered Rs. 825 and paid it to the Municipality. The present plaintiff paid as surety Rs. 2,891-1-10 and costs and has brought this suit against the co-surety defendant 1 and some of the members

of the Daregaon Co-oporative Credit Society.

The defence of the defendants other than defendant 1 was that if the society were to be held responsible, 111 members of the society were necessary parties. It was also objected that the contract was ultra vires of the co-operative society and that S. 42, Co-operative Societies Act, barred the present suit. The learned Subordinate Judge held that defendant 1, the co-surety, was liable to pay the amount of Rs. 1,398-12-5 and the suit as against defendants 2 to 17 was dismissed. On appeal the learned District Judge on the question of non-joinder of the other defendants held that the defendants did not apply to have the other members made parties, and further held that the liability of the members was unlimited under S. 4, Co-operative Societies Act, and the plaintiff who was a surety occupied two positions, viz., as surety and also a contributor. The learned District Judge was of opinion that if a man has two causes of action he is not bound to sue on both and that as surety under S. 140 read with S. 43, Contract, Act he could bring a suit against some of the members of the co-operative society. He further held that though the decree restricted the liability of the society to the property in the hands of the liquidator, i.e., the property in the hands of or realized by the liquidator, the property of the society included the untapped liability of the members which was unlimited, and therefore the members were personally responsible to the plaintiff's claim. He therefore awarded a decree for Rs. 3,065-13-7 against all the defendants including defendant 1.

It is contended on behalf of the appellants that the suit in absence of the other members of the society did not lie and ought to have been dismissed, and that if O. 1, R. 9, Civil P. C., applied, the other members ought to have been brought on the record or a decree should have been passed against the defendants to the extent of their proportionate liability and not in respect of the whole amount. It is further contended that the agreement was ultra vires of the society. Lastly it was urged that a decree as against the co-operative society was against the property of the society and the defendants could not be held liable, and that the only remedy against the members of the soceity was under S. 42, Co-operative Societies Act 2 of 1912. It is contended on behalf of the respondents that the contract was ultra vires. A decree was obtained against the co-operative society represented by the liquidator in which this point was raised and the decree was passed against the co-operative society limited to the extent of the property. It was held that the contract was intra vires. The society was then in existence, and it was properly represented by the liquidator. We think therefore that so far as the decree proceeded against the property of the society, it was binding against the society, and the point as to whether the contract was ultra vires or not cannot now be re-agitated.

The most important point in this appeal is whether the members of the co-operative society are individually liable. According to S. 4, Co-operative Societies Act (2 of 1912), Prov (2), the liability of the members is unlimited. In a Full Bench decision of the Patna High Court, *Harihar Prasad* v. *Bansi Missir* (1), it was held that as in the case of companies registered under the Companies Act, so in the case of societies registered under the Act now in question, the members are not liable to have executions issued against them in respect of judgments obtained against the society. The members can only be reached individually by the process of winding up. The judgment proceeds on the view of Lord Lindley in the 6th edition of his treatise on Companies at p. 1229, and is also based on the provisions of Act 2 of 1912. There is nothing in the rules which would render the members of co-operative societies liable individually apart from the society. It was held in *Harihar Prasad* v. *Bansi Missir* (1) that the method of enforcing a judgment against a society of unlimited liability did not differ from the method which the law allowed in the case of a society of limited liability, and therefore in either case the individual liability of the members did not arise until the stage of winding up was reached.

Under S. 41, Act 2 of 1912, where the registration of a society is cancelled, the society shall cease to exist as a cor-

1. A I R 1931 Pat 321=134 I C 421=11 Pat 174 (F B).

porate body. Under S. 42 (1), where the registration of a society is cancelled, the Registrar may appoint a competent person to be liquidator of the society, and under sub-S. (2), a liquidator appointed under sub-S. (1) shall have power, among other things, to determine the contribution to be made by the members and past members of the society respectively to the assets of the society, and to investigate all claims against the society and subject to the provisions of the Act to decide questions of priority arising between claimants. The only exception is provided in the case of the Crown under S. 44 (2) of the Act which lays down that sums due from a registered society to Government and recoverable under sub-S. (1) may be recovered firstly from the property of the society; secondly, in the case of a society of which the liability of the members is limited from the members subject to the limit of their liability; and, thirdly, in the case of other societies, from the members. The general rule is that a creditor cannot recover from the members of the society except by the machinery provided by Ss. 36 to 42, the only exception provided by the statute being in favour of the Crown under S. 44 of Act 2 of 1912.

It is contended on behalf of the respondents that the present case must be distinguished on the ground that the society has ceased to exist. It appears to me that the ground on which the case is sought to be distinguished rather goes against the contention of the respondent. The effect of the incorporation is to protect the individual members from suits by creditors. When a society is registered and becomes a corporate body the members are only liable to contribute towards the deficiency from the assets in the course of liquidation. If before the cancellation of the society the decree-holder cannot execute the decree against the members who compose the society, it is difficult to hold that the members would be liable after the extinction of the society. In Halsbury's Laws of England, Vol. 17, para. 53, p. 19, it is laid down:

"The creditors of a registered industrial and provident society must look to society for payment of their debts and not to the individual members."

The distinction between partners and members of an incorporated association is emphasized by Cave, J. in *In re Sheffield and South Yorkshire Permanent Building Society* (2), as follows (p. 476):

"He argued that persons who unite together for trading or making profits in any way are, at Common law, liable for all debts which are incurred during the time they are members of the association and that, if the association has ultimately to be wound up, past members must pay their shares of the debts. As a general rule—apart from legislation—that is perfectly true with respect to partners, and with respect to associations in the nature of partnership where there is no incorporation, but with respect to corporations the case is entirely different where the legislature has not thought fit to intervene, or where the charter under which the body is incorporated does not provide otherwise. A corporation is a legal persona just as much as an individual; and, if a man trusts a corporation, he trusts that legal persona, and must look to its assets for payment: he can only call upon individual members to contribute in case the Act or Charter has so provided."

Reference was made on behalf of the respondent to S. 5, Cl. 2, Bombay Act 7 of 1925, which provides that the liability of a society of which the primary object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists and of which no member is a regisrered society, shall be unlimited and the members of such a society shall, on its liquidation, be jointly and severally liable for and in respect of all obligations of such a society. The unlimited liability is to come into existence on liquidation and it must be understood in the sense of contributory liability in the liquidation proceeding. It is left to the liquidator to decide in the liquidation proceeding to recover the amount of debt on the basis of equal payment and the contribution is to be recovered from each member during the process of the liquidation and that liability is unlimited. The unlimited liability of the members cannot be enforced in a separate suit when the society is incorporated and is in existence much less after the extinction of the society. I think therefore that a decree passed against the defendants other than defendant 1 in this suit is erroneous on the ground that the remedy of the plaintiff was to approach the liquidator to enforce the unlimited liability during the process of the liquidation of the several members in order to pay off the decree-holder.

2. (1889) 22 Q B D 470=50 L J Q B 265=53 J P 375=60 L T 186.

If the liquidator had failed to comply with the requisition it would have been open to the plaintiff to approach the Registrar. The plaintiff was entitled as a surety under S. 140, Contract Act, to the rights of the creditor who had obtained a decree against the estate of the society. The learned District Judge held that the plaintiff was entitled to proceed against the estate of the society which included the untapped liabillty of the members; but the individual liability of the members could not be tapped except by the machinery provided by Ss. 36 to 42 of the Act.

It is therefore unnecessary to consider the other point urged whether the other members ought to be made parties to the suit. I think therefore that the decree passed by the first Court is right and that the view taken by the lower appellate Court is erroneous so far as defendants other than defendant 1 are concerned. As regards defendant 1, who is a surety, his liability to pay the amount of Rs. 1,398-12-5 is clear on the agreement of suretyship. That decree was not appealed from and has become final. We reverse the decree of the lower appellate Court and restore that of the trial Court. The order as to costs of the first Court will stand. The appellants will get the costs in this Court and in the lower appellate Court. As regards defendant 15, who is respondent 6, it was held that he was not a member and still he was joined as respondent 6. He was unnecessarily made a party to the appeal The appellants must pay the costs of respondent 6. Similarly the appellant must pay the costs of respondent 7, who was defendant 16, on the ground that though defendant 16's name was struck off in the lower appellate Court he is unnecessarily joined as a respondent in this appeal.

Barlee, J.—I agree. It is unfortunate that the plaintiff has misconceived his right in this matter. As a surety he was liable to satisfy the claim of the Municipality against the society and having done so was entitled to stand in the shoes of the Municipality and had the remedies which had been available to that body. But it is not correct to say that the members of the society were joint promisors and as such individually liable to pay the debts of the corporate body to which they belonged. The learned Judge has treated them as partners, but they were not partners. The society was a corporate body created by statute and the Municipality dealt with it and not with the individual members: see *Harihar Prasad* v. *Bansi Missir* (1). The members were subject to a statutcry liability to contribute to the debts of the society; but, apart from rules that liability could only be enforced by the procedure of winding up contained in the Act, and not directly by suit of a creditor. Thus it was not an asset, available to the Municipality, or the plaintiff as surety, which could be reached by the process of suit and execution.

R.K. *Decree reversed.*

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MURPHY AND NANAVATI, JJ.

Hirachand Sunderji—Applicant.

v.

Venidas Nemchand—Opposite Party.

Civil Revn. Appln. No. 8 of 1932, Decided on 12th October 1932, against order of Judicial Assistant to Resident Aden, in Appln. No. 118 of 1931, in insolvency.

(a) Civil P. C. (1908), S. 115—Aden Courts are subordinate to Bombay High Court for S. 115—Aden Civil and Criminal Justice Act (1864), S. 18.

The Bombay High Court has power under S. 115 to revise an order of the Judicial Assistant at Aden as the latter is subordinate to the former: 30 *Bom* 246 (*P C*) and 34 *Bom* 267, *Ref.* [P 195 C 1, 2]

(b) Aden Civil and Criminal Justice Act (1864), S. 15—Only spirit and principles and not specific provision of any act are to be applied.

Only the spirit and principles of the laws and regulations in force in the Presidency of Bombay are to be applied by the Aden Court, but a specific provision of an Act cannot be so applied by itself. [P 196 C 1]

G. N. Thakor and *B. I. Sargon*—for Applicant.

M. P. Amin, *Amar Chand* and *Mangaldas*—for Opposite Party.

Nanavati, J.—This is an application to revise an order of the Judicial Assistant at Aden in which he refused to entertain an application by the present applicant requesting him to adjudicate one Venidas Nemchand as an insolvent by applying the spirit and principles of the Provincial Insolvency Act under S. 15, Aden Act 2 of 1864. The present ap-

plication is made under S. 115, Civil P. C. and Mr. Amin for the opponent has taken a preliminary objection. His point is that such an application is not competent inasmuch as the Court of the Judicial Assistant at Aden is not a Court subordinate to this High Court. His contention is that the powers of revision given to the High Court under the Aden Act are only of a restricted character and in support of this he refers to the preamble of that Act, which says:

"And it is expedient to provide for the superintendence or revision of certain of such judgments and proceedings by the High Court at Bombay;"

the judgments and proceedings referred to being of the Resident at Aden. He wishes to deduce from these words the result that the High Court will have no powers of superintendence or revision except in matters expressly referred to in that Act, and that therefore the powers under S. 115, Civil P. C., would not be available for the present application. He has referred to several rulings of this Court, but for the present purpose, I think it is enough to consider only one of them, viz., *Rahimbai Jamalbhoy* v. *Mariam Abdul* (1). It was held there that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of S. 8, Aden Act (2 of 1864) the Resident's Court is subordinate to the High Court. I do not think that the result of this ruling is, as argued by Mr. Amin, to lay down that the Resident's Court is not subordinate to the High Court for any other purpose except the provisions of S. 8. The question there was with reference to S. 8, and that is why the principle is stated in that form.

If a Court is subordinate to the High Court for certain purposes there is no denying that it is a subordinate Court, and if it is a subordinate Court the powers conferred by S. 115, Civil P. C., come into operation. It is not a sufficient answer that according to the preamble of the Aden Act the intention was to provide for the superintendence or revision only in certain matters. That may or may not be correct in so far as that particular Act is concerned; but the powers of the Court under other enactments would come into play, if and as soon as the conditions necessary for the purpose are satisfied. It is not that this Court has held that the Aden Court is subordinate only with respect to matters under S. 8. It has been held that the powers of superintendence extend to the transfer of cases from that Court to this Court under the Letters Patent: see *Municipal Officer, Aden* v. *Ismail Hajee* (2). Moreover under S. 31, Aden Act, itself it is provided that the High Court at Bombay shall have power to make and issue general rules for regulating the practice and proceedings of that Court. These facts confirm the view that the Aden Court is subordinate to this Court. A reference was made to S. 3, Civil P. C., which deals with the subordination of Courts, where it is stated:

"For the purposes of this Code, the District Court is subordinate to the High Court, and every civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court."

It was contended by Mr. Amin that the Court of the Judicial Assistant at Aden was not subordinate to the High Court under this section. But that Court is the principal Court of civil jurisdiction in that area and as such corresponds to a District Court, even if it is not so designated. There is nothing in S. 3 therefore which conflicts with the view that regards it as a subordinate Court. I am accordingly of opinion that in a suitable case this Court has power under S. 115 to revise an order of the Judicial Assistant at Aden. That leads me to consider the application on the merits. Mr. Thakor, for the applicant, based his case on S. 15, Aden Act, which is in these terms:

"In the administration of civil justice, the Court of the Resident shall be guided by the spirit and principles of the laws and regulations in force in the Presidency of Bombay, and administered in the Courts of that Presidency not established by Royal Charter, and in the High Court in the exercise of its jurisdiction as a Court of appeal from those Courts."

He contends that by virtue of this section the Court at Aden was empowered and bound to apply the whole of the Provincial Insolvency Act and proceed under it to deal with his application. He conceded that if the Court found that some injustice or inequity might result from a strict application of every provision of that Act, the Court would have the power and discretion not to apply the

1. (1910) 34 Bom 267=5 I C 867.

2. (1906) 30 Bom 246=30 I A 38=8 Sar 901 (P C).

Act strictly. But this is the only concession he would make with reference to the words "the spirit and principles of the laws and Regulations in force."

Now, it seems to me that such a contention places too great a strain on that provision. If it is to be taken at its face value it would make it unnecessary to extend any enactment in force in this Presidency to Aden, which is a Scheduled District under the Scheduled Districts Act and to which all the laws applicable to the Bombay Presidency do not necessarily apply. The object of separating certain districts as scheduled districts is to ensure that complicated laws which may not be suitable to a somewhat primitive state of society, or laws requiring elaborate machinery which may not exist in backward tracts, should not be applied to such backward tracts without due consideration. But if the contention that is put forward in this application is to prevail, such a reservation would lose most of its meaning. I think that there are very serious difficulties in construing S. 15 to mean that a whole system of law such as is laid down in the Provincial Insolvency Act can be applied merely by virtue of the words, "shall be guided by the spirit and principles of law." The Provincial Insolvency Act is one organic whole and it would not be easy to apply one portion of it without application of all its sections, or where the machinery for carrying out all its provisions does not exist. To take one example, an order of adjudication brings about certain consequences which follow as a matter of course on that order. All the property of the insolvent is vested in the Court, or in a receiver appointed by the Court, and the remedy of a creditor by way of a suit becomes barred. I do not see how legal rights can be set at naught without a definite statutory power conferred by the legislature such as is conferred under the Provincial Insolvency Act.

The legal rights of the insolvent in his own property are divested, and the legal rights of a creditor to take steps by way of a suit are barred, only because the statute provides for it, and it does not seem possible for the Court to say that all these consequences result without any legislation, merely by applying the spirit and principles of an Act applicable in another area. Similarly, a discharge under the Act releases an insolvent from all debts which he has scheduled. There are also provisions for the avoidance of voluntary transfers and of preferential transfers to creditors. Penalties are provided for certain offences and for obtaining credit by an insolvent. I do not see how the Court can say that these powers can be assumed to have been conferred on it by implication under S. 15 of the Aden Act. The learned Judge has himself felt this difficulty, and has concisely indicated it in his order. He says:

> "I do not consider I can apply provisions of insolvency law when another portion, such as the punitive section of either Insolvency Act, could not be enforced."

He has therefore considered the question and held that it was not possible for him to apply a specific provision of the Insolvency Act, not having the power to apply it as a whole, under the guise of being guided by its spirit and principles as contended by the applicant. I do not see how we can override that discretion. It is not possible for the High Court to indicate in detail to him what he has to consider as being the spirit or principles of an enactment like the Provincial Insolvency Act and how far he is to be guided by it. In my view, therefore, the learned Judge rightly acted in dismissing the application, and the present application must, therefore, fail.

Murphy, J.—This is an application to revise an order of the Judicial Assistant to the Resident, Aden, declining jurisdiction in insolvency on the petition of a creditor on the ground that the Provincial Insolvency Act has not been applied, for Aden, as a Scheduled District, requires an applying notification under the Scheduled Districts Act, where an enactment, as in this case, has not proprio vigore been made to extend to the Scheduled Districts. We have negatived a preliminary objection that no revision to us lay under S. 115 of the Code. We have considered all the cases, but they are all summed up in the case of *Sadeck Abdulla* v. *Mahomed Abdulla* (3), a ruling to which I was a party, and in addition to what has just been said by my learned brother, it is enough for me to refer to the reasons I then gave for holding that on the facts before us we

3. A I R 1929 Bom 190=115 I C 407.

have jurisdiction to hear the matter. On the merits, the application must fail. The applicant's case rests on S. 15 of the Aden Act, which sets out, for the guidance of the Courts, that,

"in the administration of civil justice, the Court of the Resident shall be guided by the spirit and principles of the laws and Regulations in force in the Presidency of Bombay, and administered in the Courts of that Presidency not established by Royal Charter, and in the High Court in the exercise of its jurisdiction as a Court of appeal from those Courts."

The section is a very wide one, and its generality seems to me to cause the difficulty in applying it as here desired. The provision is one not uncommon in Acts and Regulations for special areas, such as Scheduled Districts, as for instance Ajmer Merwara, and in Notifications under the Foreign Jurisdiction Order in Council, and the sense in which it is usually interpreted by the Courts concerned, over some of which I have presided, is to apply some provision of an Act not specifically applied, in a case already pending in which jurisdiction admittedly exists. I have never known it to be applied in the actual assumption of jurisdiction under a Special Act where none already exists. What I mean can perhaps best be explained by an illustration. Had the old Civil Procedure Code of 1877, which contained in Ch. 20 some simple insolvency provisions, still applied, and had those provisions not been repealed by the Provincial Insolvency Act of 1907, it would, I think, have been possible to take the spirit or principle of some rule in the present Provincial Insolvency Act, and to have applied it to facts not specifically provided for in the insolvency provisions of the old Civil Procedure Code, as insolvency jurisdiction would then already have existed. Similarly, where the Indian Limitation Act does not apply, it has sometimes been held that its spirit, which is to exclude stale claims, may be applied in cases in which, had it extended the claim would have been held long time-barred. This, I think, shortly put, is the real meaning of S. 15, and I do not think any other construction can be put on it without introducing many difficulties and in fact abolishing the distinction between enactments which extend or have been extended to a Scheduled District, and ones which have been excepted, probably for administrative reasons and lack of machinery for applying their provisions.

In the present case it would obviously be very difficult to apply the whole of, or a section out of, the rules of the Provincial Insolvency Act, in the absence of any originating jurisdiction to the application at its initial stage, and I think this could not possibly have been meant by S. 15. I agree that the rule must be discharged with costs. It is for the Local Government to consider whether the Provincial Insolvency Act should be applied to Aden or not.

R.K. *Rule discharged.*

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PATKAR AND BARLEE, JJ.

Halemabi—Appellant.

v.

Ardeshir B. Cursetji—Respondent.

First Appeal No. 127 of 1932, Decided on 6th December 1932, from decision of Commissioner of Workmen's Compensation, Bombay.

(a) Workmen's Compensation Act (1923), S. 10 (1), Proviso 2—Injury trivial in workman's opinion is sufficient cause.

Where at least in the opinion of the deceased the injury was trivial and was such that he was not entitled to compensation under the Act, the failure to give notice by the deceased workman is due to sufficient cause: *Albison* v. *Newroyd Mill Ltd.*, (1925) 18 *B W C C* 474; *Fenton* v. *Owners of S. S. Kelvin*, (1925) 18 *B W C C* 328 and *Ellis* v. *Fairfield Shipbuilding* and *Engineering Co.*, (1913) S C 217, *Rel on.* [P 199 C 2]

(b) Workmen's Compensation Act (1923), Ss. 10 and 30—Question whether facts found constitute reasonable cause is question of law.

The question whether the facts found by the Commissioner under the Workmen's Compensation Act constitute reasonable cause for failure of the injured workman to give notice of the accident or to claim compensation within the statutory period is a question of law, and the Commissioner's decision on the question is open to review by the High Court. [P 199 C 2]

S. C. Joshi and *B. G. Modak*—for Appellant.

H. C. Coyajee and *Smetham, Byrne* and *Lambert*—for Respondents.

Patkar, J.—In this case the widow of one Mahmed Ahmed Shaikh Mahiboo claimed compensation for the death of her husband who died as a result of an injury which he sustained while in the employment of the respondents. Various

contentions were raised in the lower Court : (1) whether the applicant was a dependent ; (2) whether the deceased workman received an injury as the result of an accident which arose out of and in the course of his employment, and whether the injury caused his death; and (3) whether notice was given as provided in S. 10, Workmen's Compensation Act, and whether if such notice was not given, the failure to give notice was due to sufficient cause. On the first two points the Commissioner decided in favour of the applicant. On the last point he held that there was no sufficient cause to prevent the deceased from going to the doctor and also informing his foreman, who was constantly on the ship, and therefore the failure to give notice was not due to sufficient cause. It appears that the deceased received an injury on 19th October, while he was doing work on the hatch of the boat "S. S. Khandalla" and received an injury with the result that the nail was off the middle finger. He worked on for half a day and also at night on the 19th, and worked on the 20th at night, on the 21st he did not work, on the 22nd he worked during the day, on the 24th he worked day and night, on the 25th he worked during the day, and on the 26th he worked at night, on the 27th he did not work, and on the 28th morning he got lock-jaw and was removed to the hospital and died of tetanus at 9 a. m. On 30th October, the applicant, the widow of the deceased, gave notice to the opponents claiming compensation for the injury received by the workman during the course of his employment, and on 21st November 1931 she filed an application before the Commissioner.

Uuder S. 10, Workmen's Compensation Act, a workman has to give notice of the accident as soon as practicable after the happening thereof. It is contended on behalf of the appellant that the notice given on 30th October was given as soon as practicable after the happening of the accident. In the alternative it is urged that if no notice was given of the accident, the failure to give notice was due to sufficient cause under prov. 2, S. 10 (1). It appears clear from the evidence, and there is also the finding of the learned Commissioner, that the deceased appears to have worked up to the night of 26th October. He became ill on the 27th and was removed to the hospital on the morning of the 28th where he died at 9 a.m. of tetanus. It is clear that the deceased did not give any notice of the accident, and it is difficult to hold that the notice given by the widow after the death of the workman on 30th October would be a notice of the accident. The question, however, for decision in this appeal is whether the failure to give notice was due to sufficient cause. It is contended on behalf of the appellant that a workman, when he receives an injury, is not bound to give notice till he realizes that he is entitled to compensation under the Act, and reliance is placed on the decision in the case of *Albison* v. *Newroyd Mill, Ltd.* (1), where a girl of 15, on 22nd January 1925, knocked some bobbins off the creel, one of which dropped on her nose causing it to bleed, but she continued at work after going to her superintendent, who wiped her nose, and her nose swelled and was treated by her mother and she did not leave work until 12th March 1925. It was held that notice to be given as soon as practicable must be given as soon as the workman realizes that his condition entitles him to compensation for injury by accident. The same view was taken in the case of *Fenton* v. *Owners of S. S. "Kelvin"* (2). At p. 334 reference is made to the judgment of Buckley, L. J., in the case of *Webster* v. *Cohen Brothers* (3), where it was observed at p. 97 as follows :

> "We must distinguish between two different sets of facts : in the one the workman says : 'If things continue as they are, I shall never require to give notice of any claim for compensation'; that might be reasonable cause for not giving notice. The other state of facts is this: the workman says to himself: 'I have had an accident, the results of which are serious, but I think they will alter for the better. I shall not give my employer notice of the accident, because if, as I hope, the results alter for the better, I shall never have to give notice of a claim for compensation at all.' That is not reasonable cause for the failure to give notice of the accident."

The question therefore in such a case is whether the workman considers that he is entitled to compensation under the Act and whether he thinks that he shall never have to give notice of any claim for compensation because the injury

1. (1925) 18 B W C C 474=95 L J K B 667=134 L T 171.
2. (1925) 18 B W C C 328 = 2 K B 473 = 95 L J K B 316=133 L T 664.
3. (1913) 6 B W C C 92 = 108 L T 197 = 29 T L R 217=57 S J 244.

which he has received is considered by him to be trivial. The same view was taken by Lord Dunedin in *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (4), referred to by Lord Sankey in *Shotts Iron Co.* v. *Fordyce* (5), where it is observed as follows (p. 509):

"A man may have an accident, and honestly believe at the time that nothing serious has happened to him and therefore not conceiving that he has a good claim against his employer, makes no claim, but if it afterwards turns out that he has made a mistake in fact and really has been injured, that may be . . . reasonable cause for his not making the claim within the six months."

The learned Commissioner in this case considered that there was no evidence whatever that the deceased thought anything of the kind, namely, that the injury was trivial, and that it was impossible for a Judge to draw inferences where there are no facts from which an inference can be drawn. He discarded the evidence of the witness Chunilal Shivraj that it was a trivial injury on the ground that according to the witness the deceased went to the doctor, but in the latter part of the judgment, he disbelieved the witness on the strength of the evidence of the doctor—Hormasji Dorabji Kapadya—and held that the deceased did not go to the doctor. If the Commissioner's view is right that the deceased did not go to the doctor it would support the inference that at least in the opinion of the deceased the injury was trivial. The very fact that the deceased did work according to the finding of the learned Commissioner, up to the 26th night, shows that the deceased considered that the injury was trivial. If tetanus had not intervened and the man had not died on account of the effects of the tetanus, there is every possibility that the workman would not have made any claim for compensation. According to S. 3, sub-S. (1), Cl. (a), a workman is not entitled to compensation unless he is incapacitated for work for more than ten days, and it is difficult to hold that the deceased thought that he was entitled to compensation under the Act before the lapse of ten days after receiving the injury which he considered to be trivial. The learned Commissioner has not given effect to the finding in his judgment that the deceased worked up to the night of the 26th, that he became ill on 27th and was removed on the morning of 28th, to the hospital where he died at 9 a. m. of tetanus. Having regard to the fact that the deceased was in the habit of doing hard work, and particularly to the fact that he is described as a gymnast, the slight injury that he received must have been considered by him to be trivial. The undisputed fact that he worked till the 27th is conclusive on the question that at least in the opinion of the deceased the injury was trivial and was such that he was not entitled to compensation under the Act. If that is so, the failure to give notice was in my opinion due to sufficient cause.

It is urged on behalf of the respondent that there is difference in the English Act and the proviso to S. 10, and that it is the Commissioner who must be satisfied that the failure to give notice or institute the claim, as the case may be, was due to sufficient cause. It was held in the case of *Shotts Iron Co.* v. *Fordyce* (5) that the question whether the facts found by an arbitrator under the Workmen's Compensation Act, 1925, constitute reasonable cause for the failure of the injured workman to give notice of the accident or to claim compensation within the satutory period is a question of law. It would, therefore, follow that the Commissioner's decision on the question is open to review. When an appeal is provided under the Act, the appellate Court is placed in the same position as the Commissioner to decide whether on the facts found the failure to give notice was or was not due to sufficient cause. In the circumstances of the present case, I think that the failure to give notice by the deceased workman was due to sufficient cause within proviso 2, S. 10 (1), and therefore the view of the learned Commissioner on this point is erroneous. The result therefore is that the appeal will be allowed. The order of the lower Court dismissing the application must be set aside, and the case must be sent down to the Commissioner for decision on the merits. Costs will be costs in the application.

Barlee, J.—I agree. In this case the accident occurred on 19th October and no notice was given at all by the deceased. He continued to work in the op-

4. (1913) S C 217=6 W C C 308=50 S C L R 137.
5. (1920) A C 503=23 B W C C 73=99 L J P C 101=46 T L R 351=143 L T 200.

ponents' employment until the 26th and he died on the 28th at 9 a. m. of tetanus. As he gave no notice the question whether notice was given as soon as practicable scarcely arises. The first question in this case is really whether his case comes within proviso 2 to S. 10. sub-S. (1), Workmen's Compensation Act, that is to say, was the failure to give notice due to sufficient cause? The second question is have we jurisdiction in appeal to differ from the finding of the learned Commissioner which is that the appellant, the applicant before him, had not made out sufficient cause? On this question we have had a number of decisions cited to us, and with respect I would quote the words of Lord Chancellor Sankey in the case of *Shotts Iron Co.* v. *Fordyce* (5):

"Once again I should like to protest against the great number of cases which are so often cited upon this Act. I prefer to go back if possible to the words of the Statute and not to consider such words through a vista of decisions (p. 508)."

Therefore, I shall not refer to any cases except that which I have cited. The decision there was that it is sufficient cause for the failure to make a claim if the person injured has no idea that he can make any reasonable claim.

In the present case the deceased suffered an injury to a finger. It did not prevent him from going on with his work. He did not think it necessary to go to the doctor. He continued to work for six or seven days, and finally it was not this injury which was the cause of his death, but tetanus, which one might call a latent injury of which he could not know or did not know. Now in dock work a workman must continuously suffer slight injuries and unless we hold that it is necessary for men to notify every bruise or scratch, we must say that this man had sufficient cause for not notifying the trifling injury which he had suffered. He could not give notice of his danger for he had no knowledge of it. He had no knowledge of any such injury, one might say, as comes within the category of accidents for which a demand for compensation could conceivably be made. I am therefore of the same opinion as my learned brother that he had sufficient cause for not notifying the injury to his finger. An appeal under S. 30 lies only when there is a substantial question of law. In this case I am of opinion that the learned Commissioner has erred in the exercise of his discretion, when deciding whether there was sufficient cause, in that he has left out of account some in the most salient facts. He writes:

"Mr. Joshi suggests that the deceased thought that the injury was so trivial that it was not worth bothering about . . . On this point there is no evidence whatever before me that the deceased thought anything of the kind and is impossible for a Judge to draw inferences where there are no facts from which an inference can be drawn."

With respect, I think that the learned Commissioner has left out of consideration the evidence which is afforded by the conduct of the deceased that he thought his injury really trivial. Had he been troubled by it probably he would have gone to the doctor who, as the learned Commissioner says, was on the spot, and it is improbable that he would have attended to his work right up to the date of his death, which occurred some eight or nine days later. This is an error which, in my opinion, entitles us to interfere in this matter, and I agree with my learned brother that the fair order is to give compensation, and that the case must now be remanded for a decision as to the amount.

R.K. *Appeal allowed.*

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* A. I. R. 1933 Bombay 200

MURPHY AND BROOMFIELD, JJ.

Bharmal Tilokchand—Applicant.

v.

Bai Vishnabai and *others*—Opponents.

Civil Revn. Appln. No. 92 of 1932, Decided on 9th December 1932, from an order of Small Cause Court Judge, Bombay, in Suit No. 3460 of 1931.

*** Civil P. C., (1908) O, 21, R. 10, O. 20, R. 3 and S. 151—Owing to misdescription decree in wrong name—Court can in execution bring real judgment-debtor on record.**

A suit for rent had been brought against the proper person, who was misdescribed owing to his own action in giving his son's name instead of his own when he rented the premises, and who had since been refusing to receive the summons on the ground that he was not the proper person. He was the proper person against whom the decree had been rightly made. On an application in execution proceedings to bring the real judgment-debtor's name:

Held: that it was necessary for the ends of justice and to prevent abuse of the process of the Court to correct the record: *A I R* 1925 *Pat* 47 and 15 *All* 121, *Dist.* [P 202 C 1, 2]

Y. G. Gokhale and *V. V. Vidwans*—for Applicant.

H. C. Coyajee and *S. A. Deshpande*—for Opponents.

Murphy, J.—This revision application comes to us in the following manner. The plaintiffs in a Small Cause Court suit alleged that a person originally called Choitram Bharmal had hired a flat belonging to them at a rent of Rs. 60. They sued for Rs. 120 as due under the contract of letting. The suit was not defended and a decree ex parte was passed against the defendant then named Choitram Bharmal. What had happened was that when the summons was issued on the defendant in the suit, "Choitram Bharmal," the bailiff, accompanied by the rent collector, went to the residence of Tulsidas Karani, where the defendant was said to be residing, and the summons was tendered to the present applicant, whose name is Bharmal Tilockchand and whose son is Choitram Bharmal. The rent collector identified Bharmal Tilockchand as the defaulting tenant, but service was refused on the ground that he was not the person named in the summons. Subsequently a decree was passed against the defendant who had been identified as Choitram Bharmal and in due course execution was issusd against him. He was arrested under the decree but ultimately released, and in the end the decree-holders applied to the Court to have the decree altered. A long inquiry was held in the course of which the applicant's son, Choitram Bharmal, was examined as well as Tulsidas Karani and several other witnesses, and the Court amended its decree to the extent of directing that

"the name therefore of the respondent will be brought on record as defendant in the following manner: Bharmal Tilockchand alias Choitram Bharmal as is done in such cases and which ought to have been done when the decree was passed. Notice absolute and execution to issue. Rs 30 as costs to plaintiffs."

This is the order which was confirmed on appeal by the full Court and which is now challenged in revision by the present applicant.

Although we have heard the learned counsel for the applicant at considerable length and gone through a good deal of the record, the only point which seems to arise, in our opinion, is whether the ourt had power to make this alteration in the record. The findings of fact are that the applicant did actually go and rent this flat in the name of his son Choitram Bharmal, that he on occasions paid the rent, so far as it was paid and that he was the real defendant in the Small Cause Court suit. Mr. Gokhale for the applicant has argued that the Court had no jurisdiction to make this alteration in its decree, and for various reasons. In the first place, he said that the plaintiffs in the case had knowledge of the real name of the defendant they meant to sue, since Tulsidas Karani had sent a letter to the Court stating that the summons which was passed to the door of his residence in Gani Building, New Sydenham Road, was to his knowledge a misdirection as the defendant had not resided in the building. The defendant had gone to his native place, and after his departure the defendant's father Bharmal Tilockchand had been staying with him since about a month and that he had informed the bailiff of this fact but to no purpose. It is stated that on receipt of this letter by the Registrar it was read out in Court and the plaintiffs should there and then have amended their record and that owing to their laches they cannot be allowed to do it at a late stage. We do not think there is any great force in this argument. The letter was sent by Mr. Tulsidas Karani in his private capacity, and obviously the plaintiffs were not bound to take any notice of it.

It has also been argued that under O. 20, R. 3, no judgment, once signed, can be altered and reliance is placed on the case of *Harihar Prasad Narain Deo* v. *Maheswari Prasad Narain Deo* (1), another judgment in *Debendra Narain* v. *Narendra Narain* (2), and the case of *Hasan Shah* v. *Sheo Prasad* (3). In the Patna case the question was an alteration made in the decision as to court-fees, and in the Allahabad case an order as to interest had been added after the judgment had been delivered. But we do not think that these cases are really partinent to the one we have now to decide. In an earlier case of the Bombay High Court, *Vakatchand Lakhmichand* v. *Advocate-General* (4), it was

1. A I R 1925 Pat 47=82 I C 813=3 Pat 654.
2. A I R 1920 Cal 428=54 I C 636.
3. (1893) 15 All 121=(1893) A W N 44.
4. (1871) 8 Bom H C R 96.

held that in similar circumstances the Court had power on the then existing enactments, which seem to have been in fact narrower than O. 1, R. 12, to make an alteration similar to the one which had been made here. This alteration seems to us really to be no more than one of the defendant's description. The plaintiffs' case was that the then defendant had misdescribed himself by his son's name, and that he was taking advantage of this misdescription to evade his liability under the decree. All they really asked was to add to the description of the defendant such particulars as would make it clear that the present applicant was the person against whom the decree had been passed and the findings of the Court were that the present applicant was in fact the person against whom the decree had been asked for and obtained. It is also true that a judgment once delivered may not be altered by the Court which passed it, but this being a Small Cause Court suit there was in fact no judgment the order merely being one of what is called a verdict for the plaintiffs ex parte. O. 1, R. 10, provides in sub-R. (2) that the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

The language of this rule "at any stage of the proceedings" seems to us wide enough to cover what has been done in this case. But even if this is not so, we think that S. 151 of the Code confers sufficient powers on the Court to enable it to do what it actually did. On the findings of the Small Cause Court, the suit had been brought against the proper person, who was misdescribed owing to his own action in giving his son's name instead of his own when he rented the premises, and who had since been refusing to receive the summons on the ground that he was not the proper person. The finding being one that he was the proper person against whom the decree had been rightly made it was necessary for the ends of justice and to prevent abuse of the process of the Court to correct the record, and this being so, we think the correction was rightly made and the Small Cause Court was well within its powers in ordering it to be done. We discharge the rule with costs.

R.K. *Rule discharged.*

A. I. R. 1933 Bombay 202

PATKAR AND BARLEE, JJ.

Premchand Vadilal—Plaintiff — Applicant.

v.

Mithabhoy & Co. — Defendants — Opponents.

Civil Revn. Appln. No. 359 of 1931, Decided on 22nd November 1932, against order of Small Cause Judge, Bombay.

(a) Presidency Small Cause Courts Act (1882), S. 38—Trial Judge refusing stay for referring to arbitration — Evidence led — Decree passed—Full Court cannot interfere and order stay—Civil P. C., Sch. 2, Cl. 18—Arbitration Act, S. 19.

When a Judge of the Presidency Small Cause Court has refused to stay the proceedings under S. 19, Arbitration Act, or Civil P. C., Sch. 2, Cl. 18, and exercised the discretion in a particular way, and one of the parties, who wished the matter to be referred to arbitration, acquiesces in the order, leads evidence and takes the chance of success in the first Court the Full Court cannot interfere with the discretion and stay the suit : *A I R* 1921 *Cal* 770 and 41 *Mad* 115, *Rel on.* [P 204 C 2]

(b) Presidency Small Cause Courts Act (1882), S. 38 — Order refusing arbitration is appealable.

Per *Barlee, J.*—The order of the trial Court refusing to refer the dispute to the arbitrators is immediately appealable to the Chief Court. [P 205 C 1]

G. N. Thakor and *B. G. Thakor* — for Applicant.

A. G. Desai and *K. V. Rege* — for Opponents.

Patkar, J.—In this case plaintiff filed a suit in the Presidency Court of Small Causes at Bombay to recover the customs duty and other charges paid by him in respect of certain cases of piecegoods which arrived in Bombay. In April 1929 the plaintiff indented for nine cases of piecegoods from the defendants' firm. The plaintiff's contention was that the goods were not of the same quality and

colour, and two arbitrators were appointed to decide if the cases were of the contract colour and shade. In April 1930 the arbitrators agreed in their decision that the goods were not of the contract colour or shade. They however differed on another point. Subsequently the plaintiff cancelled the contract and refused to take delivery. The defendants made an application to the High Court to have an umpire appointed, and in August 1930 Wadia, J., refused the application on the ground that only one point was referred to the arbitrators, namely, the quality of the goods, and the arbitrators had agreed upon the dispute which was referred to them, and if they differed on a point which was outside the scope of the reference, there was no ground to appoint an umpire and it was more a concern of the parties. In October 1930 the plaint in the present suit was filed, and though no separate application was made for a stay of the suit under S. 19, Arbitration Act, or under Cl. 18, Sch. 2, Civil P. C., the point was raised by the defendants in their defence which contained sixteen points.

The question as to whether there should be a stay of the suit was first decided by the fifth Judge of the Court of Small Causes in February 1931. He proceeded on the ground that Wadia, J., in his judgment observed that the legal consequence of the unanimous finding was the concern of the parties and none of the arbitrators, and on a consideration of the events that occurred the learned trial Judge was of opinion that the defendants were not entitled to have the suit stayed to enable the parties to have recourse to a second arbitration. The case then went on before the Small Cause Court Judge, evidence was led by the defendants and eventually a decree was passed in favour of the plaintiff for Rs. 903-3-0 and costs. An application was made to the Full Court, and the Full Court differing from the view of the trial Court as to the construction of Cls. 21 and 22 in the contract and as to the effect of the judgment of Wadia, J., set aside the decree of the trial Court and ordered a stay of the proceedings.

It is contended before us, first, that under S. 38, Presidency Small Cause Courts Act, the defendants ought to have gone to the Full Court against the original order. Further, it is contended that after the defendants acquiesced in going on with the suit on the merits, they could not re-agitate the same question before the Full Court, and assuming that it was open to re-agitate the question before the Full Court the Full Court was not right in interfering with the discretion of the trial Court, and, lastly, it was contended that on the merits, in view of the decision of Wadia, J., the Full Court was not competent to adopt the construction which it placed on Cls. 21 and 22 of the contract, and on the merits the order of the Full Court was wrong.

The first question with which I shall deal in this application is whether the Full Court had jurisdiction to stay, or acted with material irregularity in staying the proceedings in the suit after the trial Court refused to stay them either under S. 19, Arbitration Act, or under Cl. 18, Sch. 2, Civil P. C. It appears from the proceedings of the trial Court that after the trial Court refused to stay the proceedings, evidence was led on behalf of the defendants, the suit was contested and a decree was passed in favour of the plaintiff. After the decree was passed by the trial Court in pursuance of its decision that there was no ground for stay of the proceedings, the question arises as to whether the Full Court could stay the proceedings. In *Ram Prosad* v. *Mohan Lal* (1) it was held that where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect, unless the suit has been stayed pending the arbitration; and if the Court has refused to stay an action, or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute and it is by its decision, and by its decision alone, that the rights of the parties are settled. In that case reference is made to the case of *Doleman & Sons* v. *Ossett Corporation* (2), where it was observed by Farwell, L. J., that the plaintiff cannot be deprived of his right to have recourse to the Court when the agreement is a

1. A I R 1921 Cal 770 = 60 I C 895 = 47 Cal 752.
2. (1912) 3 K B 257 = 81 L J K B 1092 = 10 L G R 915=76 J P 457=107 L T 581.

mere agreement to refer, unless the Court makes an order to that effect under S. 4, English Arbitration Act, 1889, (corresponding to S.19, Indian Arbitration Act, 1899). In *Ram Prosad's* case (1) there was an arbitration and also an award, and the Court having refused to stay the action, it was held that the Court had seisin of the dispute and it was by its decision, and by its decision alone, that the rights of the parties were to be settled.

In the present case on the point on which there is alleged to be a fresh difference of opinion between the parties, there has been no arbitration and an award, but it is contended on the one side that under Cl. 22 there is a provision for reference to arbitration, while the right to refer to arbitration has been denied by the other side. The Court, as a matter of fact, refused to stay the action, and it is difficult to hold that the alleged agreement set up in Cl. 22 would enable the Full Court, after a decree has been passed by the trial Court, to stay the suit.

The same view was taken in the case of *Appavu* v. *Seeni* (3), where it was held that a private reference to arbitration of a subject of a dispute does not prevent either party filing a suit in a Court of law in respect of the same matter ; that the arbitrators thereupon become functus officio and any award by them is without jurisdiction ; and that where there is a previous agreement to refer a matter to arbitration and a suit is filed in respect of the subject-matter of that agreement, the Court has a discretion under S. 18, Sch, 2, Civil P. C., to stay the trial of the suit. It was observed at p. 117 (of 41 *Mad.*) as follows :

> "In order to provide against the contumacious conduct of a plaintiff who has agreed to refer, but who wants to resile from it by instituting a suit, S. 18, Sch. 2, has been introduced. Under that section if the Court is appraised that an agreement to refer was entered into, it may stay the trial of the suit. In a given case, the Court may consider that the arbitrators would be able to decide the case far more efficaciously than the Court itself. In such a case the Court may ask the arbitrator to give his decision, But the discretion is in the Court, the paramount idea being that a tribunal constituted by the parties should not come in conflict or usurp the function of the tribunal which the sovereign has provided."

3. (1918) 41 Mad 115=42 I C 514.

Section 19, Arbitration Act, and Cl. 18, Sch. 2, Civil P. C., give a discretion to the Court. The words are permissive and not imperative. The words "may make" make it abundantly clear, and the jurisdiction to stay the proceedings arises if the Court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. It is therefore largely a matter in the discretion residing in the trial Court. Russell on Arbitration Edn. 11, p. 102, observes :

> "This discretion, in accordance with the ordinary rules of law, must be judicially exercised, but where it has been so exercised it will not readily be interfered with, even though the tribunal which is asked to review it may feel that, if the decision had rested with them, their own conclusion might have been different."

In the present case there is not merely an order refusing stay, but there is also an acquiescence of the defendants in the order. Under S. 19, Arbitration Act, taking a step in the proceedings disentitles a party from applying for stay : *Ochs* v. *Ochs Brothers* (4). When the trial Court has refused to stay the proceedings and exercised the discretion in a particular way, and one of the parties, who wished the matter to be referred to arbitration, acquiesces in the order, leads evidence and takes a chance of success in the first Court, it is difficult to hold that an appellate Court can interfere with that discretion. The powers conferred on Small Cause Courts under S. 38 can be more properly described as revisional than as appellate powers though not restricted to interference on questions of law : see *Sonoo Narayan* v. *Dinkar Jagannath* (5) and *In re Shivlal Padma* (6). When a decree has been passed in a suit it is a contradiction in terms to say that the appellate or revisional Court can stay the suit. I think therefore that the Full Court had no jurisdiction, after the decree had been passed by the trial Court, to stay the suit or at least acted in the exercise of its jurisdiction with material irregularity in staying the suit.

It is unnecessary therefore to go into the question as to whether the trial Court was right in its view that under

4. (1909) 2 Ch 121=78 L J Ch 555=53 S 542=100 L T 880.
5. (1918) 42 Bom 80=4 I C 486.
6. (1910) 34 Bom 316=11 Cr L J 862.

Cl. 21 and 22 it was not necessary to refer the matter to arbitration, and that the judgment of Wadia, J., precluded a second reference to arbitration. It is also unnecessary to consider whether an appeal lay to the Full Court from the preliminary decision made by the trial Court in this case that a stay should not be ordered. It is contended on the one hand that the words "or order" in S. 38, Presidency Small Cause Courts' Act, would include an order of the present character. On the other hand, reliance is placed on the explanation to S. 38 and it is contended that it is only when a decree is passed that an appeal can be filed and no appeal is permissible against an interlocutory order. Assuming however that the contention is right that there was no appeal to the Full Court from the preliminary order made by the learned Judge, I am inclined to the view that after the trial Court has exercised the discretion in refusing the stay and ordering the suit to proceed, and the defendants having taken active steps to contest the suit and having led evidence in the suit and a decree having been passed, the Full Court, in my opinion, ought not to have ordered a stay of the proceedings. On these grounds I would reverse the order of the Full Court and restore that of the trial Court with costs throughout on the defendants.

Barlee, J.—I agree. Mr. Desai's argument for the opponents is that the order of the trial Court refusing to refer the dispute to the arbitrators was wrong, that he must have an opportunity of challenging that wrong order, and that he could not do so by appealing immediately inasmuch as no appeal against an interlocutory order could be made, but he was obliged to wait until a decree had been passed, and that in his appeal against the final decision of the trial Court he was entitled to raise the question whether that Court was right in assuming jurisdiction. Now, I am not prepared to say that a party must have an opportunity of challenging a wrong order. There are many orders which cannot be challenged. Secondly, I am not prepared to say that S. 38, Presidency Small Cause Courts Act, precluded Mr. Desai's client from challenging the order at once on its being made. S. 38 gives the Full Court jurisdiction : where a suit has been contested

"on the application of either party, made within eight days from the date of the decree or order in the suit, to order a new trial to be held, or alter, set aside or reverse the decree or order."

That means, it is contended, and I am prepared to agree, a decree or an order in the nature of a decree, i. e., an order which finally decides one or more of the questions in dispute between the parties. Nevertheless, in my opinion, the opponents could have gone to the Full Court, for one of the principal questions in dispute between the parties at the time was whether there should be a further reference to arbitration or whether the case should be continued in Court, and that dispute was settled finally, so far as the trial Court was concerned, by the order of the trial Judge refusing to refer to arbitration. But assuming that Mr. Desai is right and there is no appeal, still I am not prepared to say that he had a right to challenge the order in appeal against the final decree. What he was asking the Full Court to do was to set aside the decree of the trial Judge not on the ground that it was mistaken or that the Court had no jurisdiction, but on the ground that the learned Judge of the trial Court would have been better advised had he exercised his jurisdiction in another way. This request, in my opinion, should not have been granted I agree with my learned brother that once the Court had assumed jurisdiction and had actually passed a decree, it was beyond the power of the Full Court to ignore that decree, and treat it as if it was a nullity, and to order a stay of proceedings which had already been finished. On this point the applicant must succeed. I understand that this point was not brought before the learned Judges of the Full Court, and therefore we have not had the benefit of their view, but I can see no answer to the argument put forward by the learned counsel for the applicant.

R.K. *Order reversed.*

A. I. R. 1933 Bombay 205

MURPHY AND NANAVATI, JJ.

Onkar Bhagwan—Appellant.

v.

Gamna Lakhaji & Co.—Respondents.

Appeal No. 1 of 1932, Decided on 20th September 1932, against order of First Class Sub-Judge, Poona.

(a) Civil P. C. (1908), O. 23, O. 3 — Compromise decree passed—In appeal party disowning authority of pleader or agent to compromise—Still then appeal does not lie under O. 43, R. 1 (m)—Such appeal is barred under S. 96 (3)—Remedy is to apply for review or under S. 151 to lower Court.

Where there has been no contest in the Court below, but an application for compromise has been put in and is recorded and a decree is passed in its terms, no appeal lies, either against the decree itself, an appeal therefrom being barred under S. 96 (3), or against the order under O. 43, R. 1 (m), since there are no materials for an adjudication. Before there can be an appeal under O. 43, R. 1 (m), there must have been some contest in the original Court, a contest which might be brought about, conceivably by one party alleging that there was a compromise and the other not, or where one of the parties is disowning the authority of his agent or pleader to compromise for him, either by an application for a review, or under S. 151, Civil P. C., which would open the whole matter and allow an adjudication from which an appeal might lie: *Bombay Appeal No.* 34 *of* 1923, *Foll.* [P 206 C 2; P 207 C 1]

(b) Civil P.C. (1908), O.23,R.3—Once compromise decree is passed all previous orders merge into it—No appeal lies on such orders under Civil P. C. (1908), O. 43, R. 1 (m).

Per *Nanavati, J.*—Where a decree as a matter of course follows the order recording the compromise, it would be anomalous to permit an appeal on the order alone leaving the decree untouched. Once a decree is passed all previous orders in the case, whether good or bad, merge into the decree or become ancillary to it. The decree could only be set aside by means of an appeal against it, and the provisions permitting appeals from certain orders were not meant to provide a short and inexpensive cut to a person against whom a decree is outstanding to have it set aside by means of appealing against some order leading up to the decree: *Case law referred.* [P 208 C 1, 2]

B. G Rao—for Appellants.

G. N. Thakor and *J. G. Rele*—for Respondent.

Murphy, J.—This is an appeal against an order made under O. 23, R. 3, Civil P. C. In the course of a suit in the Court of the First Class Subordinate Judge, Poona, an application was put in purporting to be signed by all the parties to the suit, the applicants being represented by their pleader and a mukhtyar. The application was to the effect that the dispute between the parties had been compromised, and requested the Court to pass a decree in terms of the compromise. The Court's order was "granted. Decree accordingly." Strictly speaking, the learned Jndge should have made an order recording the compromise and then passed a decree in its terms. But the actual words used are, more or less, a formality, and I think that the word "granted" means the same thing. A decree was accordingly passed. Thereupon, the applicants came to this Court challenging the decree on the ground that it had not been a compromise with the consent and authority of the defendants, i. e., the applicants, and contending that the Court below should have held that the mukhtyar had no authority to compromise the suit, putting him to strict proof of his authority, and similarly in the case of the pleader, who represented applicants in that Court. An affidavit has been filed in this Court making these allegations and challenging the propriety of the order recording the compromise in the Court below.

Mr. Thakor for the respondents has raised a preliminary objection, and his contention is that no appeal lies against an order of this nature. He has relied on the decision of a Bench of this Court in an unreported case, *Gulabchand* v. *Ramsukh* (1). In that matter it was held by the learned Chief Justice, in deciding such a preliminary point, that no appeal lay, his reasons being:

"An appeal from a decree passed by the Court with the consent of parties is barred by S. 96, sub-S. (3). The appellant urges that the Court has passed an order under O. 23, R. 3, and that an appeal lies under O. 43, R. 1, Cl. (m), from such an order. But in this case there was no question whether an agreement has been arrived at, the terms were signed by the parties and all that the Court had to do was to pass a decree according to the terms to which the parties had agreed. There was no adjudication therefore on the question whether a lawful agreement had been arrived at, because it was never disputed that the parties before the Court had come to an agreement. It was open to any of the parties before the decree was passed to contend that a lawful agreement had not been arrived at. Under these circumstances we think that no appeal is competent. There are other remedies open to the appellant if he thinks fit to pursue them."

The ratio decidendi of that case, which binds us, is that where there has been no contest in the Court below, but an application for compromise has been put in and recorded and a decree passed in its terms, no appeal lies, either against the decree itself, an appeal therefrom being barred under S. 96 (3), or against the order under O. 43, R. 1 (m), since there are no materials for an adjudication. What the learned Chief Justice meant was that before there can be an appeal under O. 43, R. 1 (m), there must

1. Appeal No. 34 of 1923, decided on 29th July 1925, by Macleod, C. J. and Madgavkar, J.

have been some contest in the original Court, a contest which might be brought about, conceivably by one party alleging that there was a compromise and the other not, or, where the circumstances are similar to those in the present case, where one of the parties is disowning the authority of his agent or pleaded to compromise for nim, either by an application for a review, or under S. 151, Civil P. C., which would open the whole matter and allow an adjudication from which an appeal might lie. A direct appeal was not possible on the facts in that case, and in the present one as there was and is no material before the Court on which a decision can be come to. The ruling is of a Division Bench and binds us.

But the case has also been argued on a wider basis, and we have been referred to numerous cases, which I will do no more than name. These are: *Bengal Coal Co. Ltd.* v. *Apcar Collieries Ltd.* (2), which is based on *Madhu Sudan Sen* v. *Kamini Kanta Sen* (3), *Thenal Ammal* v. *Sokkammal* (4), *Satyanarayanamoorthi* v. *Butchayya* (5), *Muhammad Rashid* v. *Rahmatullah* (6), which is a Lahore decision, *Paban Sardar* v. *Bhupendra Nath Nag* (7), *Sabitri Thakurain* v. *F. A. Savi* (8), *Uman Kuari* v. *Jarabandhan* (9) and *Lakshmi* v. *Maru Devi* (10). The difficulty raised in the argument was that where the appeal is against the order and not against the decree, even if the appeal against the order were entertained, it would not affect the decree, which has not been appealed against, the rival contention being that the vacation of the order would, in itself, have the effect of setting aside the terms of the decree. It may be noted that of these cases: *Satyanarayanamoorthi* v. *Butchayya* (5) and *Muhammad Rashid* v. *Rahmatullah* (6) were revision applications, as was that of *Sabitri Thakurain* v. *F. A. Savi* (8). The other cases were nearly all not on similar facts. One, *Lakshmi* v. *Maru Devi* (10), was in the matter of an execution application, where a remand had been ordered, which in fact only carried out the terms of the first order, which was appealed against; and the only two cases decided in appeal were the ones in *Thenal Ammal* v. *Sokkammal* (4) and *Paban Sardar* v. *Bhupendra Nath Nag* (7). The ratio decidendi in *Thenal Ammal* v. *Sokkammal* (4) was that an appeal lies against a decree passed in accordance with a compromise, where the authority to enter it is impeached, and in *Paban Sardar* v. *Bhupendra Nath Nag* (7) it appears that there had been a contest in the original Court, though the decision was set aside on the ground that a consent decree under R. 3, O. 23, Civil P. C., can be passed only after there has been an order that the compromise be recorded, this not being a mere matter of form, as the aggrieved party has a right of appeal against this order, and S. 96 (3) of the Code is not otherwise a bar to an appeal from such a decree.

There is a difference of opinion between several High Courts in India on this point. I think, myself, that the proper course in a case, such as the present, where the order for making the decree is passed practically simultaneously with the one recording the compromise, and where the compromise is challenged on the ground that none has really been arrived at would be to challenge the decree, either by an appeal, or, as suggested by Mr. Thakor, by an application for review, or one under S. 151, Civil P. C., in the original Court, when the matter could be gone into on the merits, the difficulty being that if we entertain Mr. Rao's argument, the setting aside of the order made under O. 23, R. 3, would not have the effect of setting aside the decree which is based on it. It is not however necessary to decide this point, because in this appeal we are concluded by the previous decision of the Division Bench of this Court, which I have already referred to. Following that decision, we uphold the preliminary objection that no appeal is comptent against the order in this case, and dismiss the appeal against the order with costs.

2. A I R 1926 Cal 412=87 I C 248=29 C W N 928.
3. (1905) 32 Cal 1023=9 C W N 895.
4. (1918) 41 Mad 233=41 I C 429.
5. A I R 1925 Mad 606=87 I C 124.
6. A I R 1914 Lah 112 = 24 I C 630 = 96 P R 1914.
7. (1916) 43 Cal 85=33 I C 769.
8. A I R 1927 Pat 354 = 105 I C 271 = 6 Pat 108.
9. (1908) 30 All 479 = (1908) A W N 195 = 5 A L J 447 (F B).
10. A I R 1915 Mad 197=12 I C 664 = 37 Mad 29.

Nanavati, J.—I agree. I think that where a compromise has been recorded, and it has not been challenged in any way in the lower Court, the recording of that compromise must be held to have been done by consent, and I think, S. 96 (3), Civil P. C., read with S. 108 would bar the appeal. S. 108, Civil P. C., lays down:

"The provisions of this part relating to appeals from original decrees shall, so far as may be, apply to appeals, (a) from appellate decrees, and (b) from orders made under this Code, &c.;

and S. 96 is in the same part. S. 96 (3) clearly lays down that:

"no appeal shall lie from a decree passed by the Court with the consent of parties."

It follows therefore that an order recording a compromise, if made with the consent of parties, would not be an order appealable, even though under O. 43, R. 1, an appeal is provided against orders under O. 23, R. 3. It may be objected that if that be so, the party aggrieved by a fraudulent petition of compromise would have no remedy, but I do not think that it is correct. The party could ask for a review from the Court which recorded the compromise and set forth its grievance, and it could then have no opportunity of showing to the Court that the petition was not what it purported to be, or possibly it could make an application under S. 151, Civil P. C., and it has always a remedy by a separate suit to prove fraud. But, if there is no contest before the Court which recorded the compromise on the point which is sought to be agitated in the appeal, the appellate Court is clearly at a great disadvantage, there being no evidence on which to base a decision. It seems to me therefore that the principle laid down in the unreported case referred to by my learned brother must govern our decision in the present case.

In that view of the matter, it is really unnecessary to consider the second point argued by Mr. Thakor, namely, that no appeal against the order could be entertained in the absence of an appeal against the decree following the order recording the compromise. However as the question has been fully discussed, I should like to say that it seems to me that in a case of this nature, where a decree as a matter of course followed the order recording the compromise, it would be anomalous to permit an appeal on the order alone leaving the decree untouched. Once a decree is passed all previous orders in the case, whether good or bad, merge into the decree or become ancillary to it. The decree could only be set aside by means of an appeal against it, and the provisions permitting appeals from certain orders were not meant to provide a short and inexpensive cut to a person against whom a decree is outstanding to have it set aside by means of appealing against some order leading up to the decree. None of the reported cases cited before us lead necessarily to this result. The only case that may give some support to such a view is that of *Satyanarayanamoorthi* v. *Butchayya* (5), which is a decision of a single Judge. The weight of authority seems to be against that decision for the learned Judge himself refers to a case of that High Court in which a Division Bench took the view that there could be no appeal against the order recording a compromise "when it has become merged in the subsequent decree": *Alamelu Ammal* v. *Rama Aiyar* (11). That was also the view taken in *Bengal Coal Co. Ltd.* v. *Apcar Collieries Ltd.* (2), where it was stated (p. 930 of 29 *C. W. N.*):

"If the decree follows the order it will be no straining of the language to say that the order, and for that matter all previous proceedings get merged in the decree which is the final declaration of the Court's mind and decision and lose their separate existence."

See also *Madhu Sudan Sen* v. *Kamini Kanta Sen* (3), where it was held that the right of appeal from interlocutory orders ceases with the disposal of the suit. I therefore think that in a case of this nature, if a party wishes to appeal against an order recording a compromise, and a decree has followed, he must, if at all, appeal against the decree, and challenge the order in such appeal.

V.S. *Appeal dismissed.*

11. A I R 1922 Mad 446=70 I C 425.

* A. I. R. 1933 Bombay 209

PATKAR AND BARLEE, JJ.

Sabava Yellappa—Defendant.

v.

Yamanappa Sabu—Plaintiff.

Cross First Appeals Nos. 431 of 1928 and 37 of 1929, Decided on 30th November 1932, from decision of First Class Sub-Judge, Bijapur, in Civil Suit No. 78 of 1917.

* (a) **Transfer of Property Act (1882), S. 6 (h)—Past or future cohabitation being consideration or object of transfer—Transfer is void — Immoral consideration cannot become innocent by passage of time — Contract Act (1872), Ss. 2 (d) and 23.**

If the consideration or object of passing the sale deed be immoral, i. e., past or future cohabitation, the transfer would be void and not merely voidable under S. 6 (h), T. P. Act, read with S. 23, Contract Act. And though under S. 2 (d), Contract Act, services already rendered at the desire of the promisor are placed on the same footing with services to be rendered and would constitute a consideration for an agreement, a consideration which is immoral at the time, and therefore incapable of supporting an immediate promise to pay, cannot become innocent by passage of time: *AIR* 1920 *Bom* 142 and *A I R* 1924 *Bom* 135, *Rel. on.*; 3 *All* 787, *Disc.* and *Diss. from.* [P 211 C 1,2]

(b) **Transfer of Property Act (1882), S. 54 — Past cohabitation is not valuable consideration—Contract Act (1872), S. 23.**

Ordinarily the consideration for a sale is a valuable consideration or price, and past cohabitation, besides being immoral, is not a valuable consideration. [P 211 C 2; P 212 C 1]

(c) **Contract Act (1872), S. 23 — "Object" means purpose or design.**

The word "object" in S. 23 is distinct from "consideration" and means something aimed at; it means "purpose or design:" 33 *Cal* 702 and 34 *Cal* 289, *Foll.* [P 212 C 1]

* (d) **Contract Act (1872), S. 23—Where object of transfer is immoral no interest in property passes—But principle of equity prevents Court from giving aid to person guilty of immoral conduct.**

If the object of a transfer of property is immoral, the transfer is void, and there cannot be any conveyance of any interest effected by the transfer. If the transfer is invalid, the person passing the document retains the title in himself and would ordinarily be entitled to recover the property on the ground that the title has not passed from him. But the principle of equity enunciated in the case of *Ayrest* v. *Jenkins*, (1873) 16 *Eq.* 275 would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy. [P 212 C 1]

(e) **Transfer of Property Act (1882), S. 6 (h)—Settlement of property in consideration of concubinage is immoral even though concubinage is allowed in that particular community.**

The fact that in a certain section of the community concubinage is allowed and is not regarded as immoral does not make a settlement made by a member of such community in consideration of concubinage any the less immoral. *A I R* 1921 *Mad* 326, *Foll.* [P 213 C 1]

(f) **Transfer of Property Act (1882), S. 6 (h) —Application of maxim "in pari delicto"— *Quaere*—Contract Act (1872), S. 23.**

Whether the maxim "in pari delicto" and the principle of equity enunciated in *Ayrest* v. *Jenkins* applies to the case where it is the plaintiff's father and not the plaintiff, who joined the defendant in the fraud—*Quaere*: 31 *Bom* 405, *Ref.* [P 214 C 1]

(g) **Transfer of Property Act (1882), Ss. 6 (h) and 54—Sale in consideration of past and future cohabitation — Illicit connexion subsequent to sale deed — Neither vendor nor his legal representative can get back property.**

A sale deed was executed in consideration for past and future cohabitation and subsequent to the sale deed there was illicit connexion between the vendor and vendee and an immoral object was carried out.

Held: that neither the vendor nor his legal representative can recover the properties: *Ayerst* v. *Jenkins* (1873), 16 *Eq.* 275, *Foll.* [P 214 C 1]

(h) **Limitation Act (1908), Art. 144 — Sale and possession by vendee for more than 12 years adverse to others—Suit for recovery of same by legal representative of vendor for recovery of property on ground of invalidity of sale is barred.**

A sale was executed and the properties were transferred in the name of the vendee and he was in possession adversely to others. More than 12 years subsequent to this, legal representative of the vendor sued for recovery of the property on the ground that the sale was invalid as being for immoral consideration.

Held: the suit was time-barred. [P 214 C 2]

*(i) **Transfer of Property Act (1882), Ss. 6(h) and 122 — Gift for immoral object is not valid.**

Past cohabitation cannot be an object of a gift. And even though future cohabitation can be considered to be an object of a gift when the vendor is incapable of carrying out the immoral object and has not carried it out the transfer is invalid under S. 6 (h), T. P. Act, and the vendor or his legal representative can recover the property as the principle of equity enunciated in the decision of *Ayrest* v. *Jenkins* would not come in his way as the immoral object was not carried out: *Ayerst* v. *Jenkins*, (1873) 16 *Eq.* 275, *Ref.*; 6 *All* 313 (*P C*), *Dist.* [P 214 C 2; P 215 C 1]

H. C. Coyajee and *H. B. Gumaste*—for Defendant.

G. N. Thakur and *S. B. Jathar* — for Plaintiff.

Patkar, J.—In this case the plaintiff sued to recover possession of certain lands conveyed to defendant 1 by Sabu, the adoptive father of the plaintiff, under a sale deed, Ex. 85, dated 21st September 1903, and the other lands in suit conveyed by Sabu and his wife, defendant 6, by the deed of gift, Ex. 55, on 26th June 1917. The plaintiff was adopted in June 1919 by defendant 6,

the widow of Sabu who died in September 1917. Out of the lands which were given in gift by Ex. 55, Survey No. 181 was alienated by defendant 1 in favour of defendant 5, her Mukhtyar, in 1918, who in his turn sold it to defendant 2 in May 1921. Survey No. 336, one of the lands given in gift, was sold by defendant 1 to defendants 3 and 4 in September 1918. The case of the plaintiff was that the sale transaction of 1903 was illegal and void, because defendant 1 was the mistress of Sabu, and though the ostensible consideration was cash, the real consideration was illegal, that is, past and future cohabitation. As regards the deed of gift, it was alleged by the plaintiff that defendant 1 was in a position to dominate the will of Sabu and that it was for the same unlawful object and consideration.

Defendant 1 denied that she was the mistress of Sabu and contended that she was admitted as an orphan into the house of Sabu's father and was brought up by Sabu's mother Gangava, that she was married to one Yellappa, that the sale deed was for cash consideration and that the gift was not invalid, and that as regards the properties comprised in the sale deed, the suit was barred by limitation. The sale deed, Ex. 85, dated 21st September 1903, was in respect of nine lands for Rs. 800. Out of the nine lands, four lands were repurchased by Sabu by Ex. 87 in May 1905 for Rs. 400. The lands were transferred to the name of defendant 1 in 1904 and continued to stand in her name. The deed of gift was in respect of ten lands including Survey Nos. 181 and 336 sold to defendants 2, 3 and 4. The learned Subordinate Judge held that the sale deed was passed not for cash as stated in the deed but for past and future cohabitation, but held that the suit in respect of the property comprised in the sale deed was barred by limitation as defendant 1 was in adverse possession for more than 12 years. With regard to the deed of gift the learned Subordinate Judge came to the conclusion that it was for past and future cohabitation and the deed of gift was void and the suit was within time, and therefore awarded the plaintiff possession of the lands comprised in the deed of gift, and ordered him to pay compensation to defendants 2, 3 and 4 for the improvements made by them in Survey Nos. 181 and 336 comprised in the deed of gift.

It appears from the evidence that defendant 1 was brought up by Gangava, the mother of Sabu. It is difficult to believe the defendant when she stated that she used to go to Sabu's house for household work and that she never met Sabu in private and knew him only by face till his death. It appears clear from the evidence that defendant 1 stayed with Sabu, the plaintiff's adoptive father, and that there was illicit connexion between defendant 1 and Sabu. Rajapa, Ex. 54, Amajeva, Ex. 59, Raghavendra, Ex. 65, Chandsaheb, Ex. 67, Joti, Ex. 70, Balappa, Ex. 71 and Maddanappa, Ex. 72, prove that defendant 1, Sabava, was the mistress of Sabu. (After discussing the evidence and holding that defendant 1 stayed with Sabu as his mistress and continued to live with him as his mistress after the death of her husband, the judgment proceeded.) The next question is whether the sale deed, Ex. 85, was passed for a cash consideration of Rs. 800, or whether the consideration was past or future cohabitation of defendant 1 with Sabu. Defendant 1 relies on the sale deed, Ex. 86, passed in her name by one Ningava on 6th February 1900, for a consideration of Rs. 100, and it is urged that defendant 1 used to carry on money-lending business. The evidence on the point is very meagre and the income of the land purchased by defendant 1 by Ex. 86 was insufficient to provide the consideration of Rs. 800 for the sale deed, Ex. 85. Witness Ex. 109, examined in the lower Court to prove the payment of consideration to Sabu, was properly disbelieved by the learned Judge. I agree with the view of the lower Court that the ostensible consideration of Rs. 800 was not paid and that the real consideration for the sale deed was past and future cohabitation.

It is contended on behalf of the appellant, defendant 1, that the past cohabitation is a good consideration for the sale-deed and reliance is placed on the decision on the case of *Dhiraj Kuar* v. *Bikramajit Singh* (1), and it is further urged that in the community to which Sabu belonged concubinage is not regarded with disfavour, and that a dasiputra is recognized among Shudras as

1. (1881) 3 All 787=(1881) A W N 57.

an heir and maintenance is enforceable by a concubine. It would be convenient to discuss the question of the sale-deed and the deed of gift separately.

As regards the sale-deed for an ostensible consideration of Rs. 800, no transfer could be made, under S. 6 (h), T. P. Act, for an unlawful object or consideration within the meaning of S. 23, Contract Act, 1872. S. 23, Contract Act, lays down that the consideration or object of an agreement is lawful unless the Court regards it as immoral or opposed to public policy. The consideration or object of an agreement in such a case is said to be unlawful, and every agreement of which the object or consideration is unlawful is void. In the case of a sale-deed the consideration is the amount paid as the price for the sale. The consideration is different from the object. If the consideration or object of passing the sale-deed be immoral, i. e., past or future cohabitation, the transfer would be void under S. 6 (h), T. P. Act, read with S. 23, Contract Act. In *Dhiraj Kuar* v. *Bikramajit Singh* (1) it was held that a suit lay for arrears of allowance agreed to be paid to a woman for past cohabitation. It was observed in that case as follows (p. 788):

> "Such a consideration, if consideration it can properly be called, which seems to us more than doubtful, would not be immoral, so as to render the contract 'de facto' void. But we think the more correct view is to regard the promise to pay the allowance as an undertaking on the part of Bikramajit Singh to compensate the woman for past services voluntarily rendered to him, for which no consideration, as defined in the Contract Act, would be necessary."

It appears that the case was supposed to fall under S. 25 (2), Contract Act, though it is not specifically referred to in the judgment. The view would seem to be supported by a dictum, which appears to be obiter, in the case of *Ningareddi* v. *Lakshmawa* (2), where it was observed as follows (p. 168):

> "Though such an agreement is not supported by consideration, yet as an agreement to compensate for past services voluntarily rendered, it was both according to the English and the Indian law valid and enforceable against him: see S. 25 Cl. (2), Contract Act (9 of 1872) and *Dhiraj* v. *Kuar Bikramajit Singh* (1)."

It was however held in *Kisandas* v. *Dhondu* (3) that past cohabitation is not good consideration for a transfer of property. The point does not appear to have been discussed in the judgment. It was further held that if the transaction was considered as a gift, it would be invalid as the property was joint family property. In the case of *Husseinali* v. *Dinbai* (4), which related to an agreement to pay a certain amount for services rendered as a nurse but was in reality for past cohabitation, it was held that the consideration for the document bring past cohabitation, it was unlawful as immoral or opposed to public policy, and the case of *Dhiraj Kuar* v. *Bikramajit Singh* (1) was dissented from. It appears that the document on which the suit was brought was held to be not executed and signed by the deceased, and therefore the discussion on this point would appear to be unnecessary. The reasoning however appears to me to be unassailable. Under S. 25, Contract Act, an agreement is void if made without consideration unless it came within one of the exceptions. Cl. (2) provides an exception, namely, a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do. The word "voluntarily," according to the decision in *Sindha Shri Ganpatsinghji* v. *Abraham* (5) would exclude anything done at the request of the promisor, and it is difficult to hold that the services rendered by a mistress were rendered otherwise than at the request of the person keeping the mistress. Though under S. 2 (d), Contract Act, services already rendered at the desire of the promisor are placed on the same footing with services to be rendered and would constitute a consideration for an agreement, a consideration which is immoral at the time, and therefore incapable of supporting an immediate promise to pay, cannot become innocent by passage of time. *Dhiraj Kuar's* case (1) has been distinguished in the judgment of a single Judge of the Allahabad High Court in the case of *Alice Mary Hill* v. *William Clarke* (6).

For the sale-deed in question there was no cash consideration of Rs. 800 as stated in the document. Ordinarily the consideration for a sale is a valu-

2. (1901) 26 Bom 163=3 Bom L R 647.
3. A I R 1920 Bom 142=57 I C 472=44 Bom 542.
4. A I R 1924 Bom 135=86 I C 240.
5. (1895) 20 Bom 755.
6. (1904) 27 All 266=1 A L J 632.

able consideration or price, and it is difficult to hold that past cohabitation, besides being immoral, is a valuable consideration. The sale-deed therefore might amount to a gift to defendant 1. The object of the deed is alleged by the plaintiff to be either past or future cohabitation. The word "object" in S. 23, Contract Act, is distinct from "consideration" and means something aimed at, and has been held to mean "purpose or design" in the decision in *Jaffer Meher Ali* v. *Budge-Budge Jute Mills Co.* (7), confirmed by the appeal Court in *Jaffer Meher Ali* v. *Budge-Bndge Jute Mills Co.* (8). If the object of a transfer of property is immoral, the transfer is void, and there cannot be any conveyance of any interest effected by the transfer. The object of the sale-deed in the present case was future cohabitation and might also be said to be a reward for past cohabitation. If the transfer is invalid, the person passing the document retains the title in himself, and would ordinarily be entitled to recover the property on the ground that the title has not pasesd from him. But the principle of equity enunciated in the case of *Ayerst* v. *Jenkins* (9) would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy. In *Ayerst* v. *Jenkins* (9) it was held that a Court of equity would not, at the instance of a settlor or his legal personal representative, adversely set aside a settlement by which the settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, although such a settlement may have been made for an illegal consideration not appearing on the face of the instrument. It was observed by Lord Selborne as follows (p. 283):

"In the present case relief is sought by the representative, not merely of a particeps criminis, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting in fieri, but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the defendant. I know no doctrine of public policy which requires, or authorizes, a Court of equity to give assistance to such a plaintiff under such circumstances. . . . . But the voluntary gift of part of his own property by one particeps criminis to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while the object is yet uncacomplished, a gift intended as a bribe to inequity. . . . It is a maxim of law not opposed to any equity, that *in pari delicto melior' est conditio possidentis*; and it is a principle of equity, that long delay in seeking to rescind a transaction originally voidable, on the faith of which other persons have irrevocably made their arrangements in life, may operate as a bar to relief."

In that case the object of the settlement was future cohabitation, and as the settlor lived with the woman for some time as husband and wife and the legal representative ten years afterwards brought a suit to set aside the settlement on the ground of its being founded on a bad and illegal consideration, the suit was held not maintainable. At p. 284 it was observed as follows:

"It may be that the door of this Court is not closed against persons repenting of such an unlawful connexion, and desirous of extricating themselves from fetters which, if relief were refused, might practically bind them to it. But in a case presenting no such cirrumstances, I think it consistent with all sound principle, and with all authority, to recognize the importance of the distinction between a completed voluntary gift, valid and irrevocable in law, (as I hold the transfer of these shares to the defendant's trustees to be), and a bond or covenant for an illegal consideration, which has no effect whatever in law."

It is pertinent to observe that a transfer of property for an immoral consideration or object is void under S. 6 (h), T. P. Act, and not merely voidable. The case of *Ayerst* v. *Jenkins* (9) has been considered in *Thasi Muthukannu* v. *Shunmugavelu Pillai* (10), where a young and inexperienced plaintiff assigned to the defendant, a dancing-girl, a mortgage for Rs. 1,500, and the consideration stated in the document was not real, but the real consideration was future continuance of immoral relations between the plaintiff and the sister of the defendant. It was held that where the transaction amounted to a voluntary gift, it could not be set aside, but where a transaction, though completed, was intended to be for a consideration, it could be impeached if the consideration was immoral, and it made no difference whether the transaction was executed

7. (1906) 33 Cal 702=10 C W N 755.
8. (1907) 34 Cal 289=11 C W N 566.
9. (1873) 16 Eq 275=21 W R 878=29 L T 126.
10. (1905) 28 Mad 413=15 M L J 286.

or executory. The case of *Ayerst* v. *Jenkins* (9) was distinguished on the ground that the assignment of the mortgage was not a gift but was intended to be passed for a consideration and also purported to do so and therefore could be impeached, and reference was made to *Phillips* v. *Probyn* (11), which has been criticized in Ashburner's Principles of Equity, 1902 Edition, at p. 138. It was further held that the plaintiff was not in pari delicto on the ground of his age and his inexperience and want of independent advice.

The case of *Ayerst* v. *Jenkins* (9) was followed in *Deivanayaga Padayachi* v. *Muthu Reddi* (12), where it was held that it is a well established rule of equity that a person who has transferred his property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out, and that S. 6, Cl. (h), T. P. Act, had not the effect of modifying the rule of equity. In that case the illegal purpose was past and future cohabitation. It was held by Oldfield, J., that the fact that in a certain section of the community concubinage is allowed and is not regarded as immoral does not make a settlement made by a member of such community in consideration of concubinage any the less immoral. I agree with the view thus enunciated and it is an answer to the other argument raised on behalf of defendant 1 that in the community to which Sabu belonged concubinage is not regarded as immoral and that a dasiputra is entitled to inheritance. In that case the transfer was not only for past cohabitation but for future cohabitation, and some years after the date of the transfer a suit was brought to set aside the transfer. It was held by Abdur Rahim, J., in that case that though the wording of S. 6 (h), Cl. (2), was clear that no transfer could be made for an unlawful object or consideration, it did not lay down in what classes of cases the Court would or would not assist a person particeps criminis, and did not modify the well established rule of equity as propounded in *Ayerst* v. *Jenkins* (9).

On the other hand in *Ghumna* v. *Ram Chandra Rao* (13), where a gift was made to a husband and wife for the purpose of maintaining immoral relations with the female donee, and where after the murder of the donor by the donees a suit was brought by the heir of the donor, it was held that the consideration for the transfer was future illicit connexion between the donor and the female donee, and the consideration being unlawful, it could not be a valid consideration for the deed of gift at all, and that the deed was not only voidable but absolutely void from the very beginning and it was not necessary to be avoided by suit. The decision in this case is inconsistent with the decision in *Deivanayaga Padayachi* v. *Muthu Reddi* (12), and the question as to whether the transferor or his heir could get the assistance of the Court for setting aside the gift which was for the continuance of future immoral relations was not considered.

The case of *Brahmayya Lingam* v. *Mallamma* (14) relates to a gift made for past cohabitation and future cohabitation, and it was held that it was a well established rule of equity that a person, who has transferred property to another for an illegal or immoral purpose, cannot get it annulled if the intended purpose had been carried out, and as part of the consideration was for the past cohabitation and the defendant continued as the plaintiff's concubine for some time after the deed, the plaintiff could not succeed. The maxim in *pari delicto potior est conditio possidentis* is intimately connected with another rule of the law, *ex turpi causa non oritur actio* : see Broom's Legal Maxims, Edn. 9, p. 466, and *Scott* v. *Brown* (15). Apart from authorities, the consideration for a sale under S. 54, T. P. Act, is price or valuable consideration. If the object of the sale is the continuance of immoral relations, the transfer would be a nullity according to S. 6 (h) and no title would pass. If the object is the maintenance of future immoral relations, the transferor can get back the property if the immoral object has not been carried out. It is only where the immoral object has been carried out that the

11 (1899) 1 Ch 811=68 L J Ch 401=15 T L R 324=80 L T 513.

12. A I R 1921 Mad 326=59 I C 1003=44 Mad 329.

13. A I R 1925 All 437=88 I C 411=47 All 619.

14. A I R 1924 Mad 849=82 I C 14.

15. (1892) 2 Q B 724=61 L J Q B 738=57 J P 213=41 W R 116=67 L T 782.

principle that a Court of equity would refuse its aid to a person who is a particeps criminis would prevent the man from recovering back the property. It is difficult to hold that past cohabitation can be considered as consideration for a sale. It has been held by recent Bombay decisions, to which I have referred, that past cohabitation is not a good consideration for a transfer of property. I think that "consideration" means valuable consideration, and where the object of a transfer of property is illegal or immoral the transfer is void, and where the illegal object has been carried out, the Court will not lend its aid to the plaintiff, who has been guilty of such immoral or illegal conduct, to recover back the property. In the case of the sale-deed in the present case, which was for past and future cohabitation, Sabu could not have maintained a suit to recover back the property, as after the date of the sale-deed, there was illicit connexion between Sabu and defendant 1, and the immoral object having been carried out, he would have been prevented from recovering back the property, and according to the decision in the case of *Ayerst* v. *Jenkins* (9) his legal representative would also be barred. It is somewhat difficult to hold that the plaintiff, the adopted son, is in pari delicto with defendant 1, the mistress of Sabu. In this connexion I would refer to the doubt expressed by Sir Lawrence Jenkins in the case of *Sidlingappa* v. *Hirasa* (16) as follows (p. 412) :

"Though we have dealt with the case as if both parties to this litigation had been equally culpable, it is to be noticed that it was the plaintiff's father and not the plaintiff, who joined the defendant in the fraud, and it is a question whether it can be said that the plaintiff and the defendant are in pari delicto : *Mathew* v. *Hanbury* (17), *Muckleston* v. *Brown* (18)."

Assuming that the estoppel as laid down in the case of *Ayerst* v. *Jenkins* (9) equally applies to the plaintiff, the adopted son, the plaintiff would be prevented from recovering the properties conveyed in the sale-deed on the ground that the immoral object had been carried out by Sabu after the date of the sale-deed. There is also another objection to the plaintiff's claim with regard to the properties comprised in the sale-deed, that the suit is barred by limitation. Defendant 1 has been in adverse possession for more than 12 years of the five properties comprised in the sale-deed. The finding of the lower Court was attacked in appeal on behalf of the plaintiff, but I agree with the view of the lower Court that the khata of the properties was transferred to the name of defendant 1 in 1904 or 1905, and the possession of the defendant has all along been adverse. The plaintiff's claim therefore with regard to the properties comprised in the sale-deed must fail. With regard to the deed of gift of 1917, a deed of gift does not require any consideration. According to S. 122, T. P. Act, a gift is a transfer made voluntarily and without consideration. The question is whether the object is immoral or unlawful within the meaning of S. 23, Contract Act. In the present case I think that the deed of gift was passed with the motive of recompensing defendant 1 for past cohabitation and with the object of maintaining the immoral relation with defendant 1 in the future. The object, in my opinion, is something which is to be aimed at contemporaneously or in future as being some purpose or design for which a transfer is made. The object means the end to which effort is directed or the thing aimed at, that which one endeavours to attain or carry out. In the present case there was the immoral object so far as the future cohabitation with defendant 1 was contemplated by Sabu. But it appears from the evidence that Sabu was then ailing and though he might have hoped that he would recover, he died soon afterwards. The past cohabitation may be a motive for the gift, but, in my opinion, cannot be said to be an object which implies something aimed at simultaneously or in the future. Past cohabitation would be consideration for an agreement under S. 2 (d), Contract Act, but is not good consideration for a transfer of property. A gift does not require consideration. It is difficult to hold that past cohabitation can be an object of a gift. Future cohabitation can be considered to be an object of the gift. So far as the object as regards the maintenance of future immoral relations was concerned, I think in the present case Sabu did not carry out the immoral object as he was incapable of carrying it out owing to his illness and died soon

16. (1907) 31 Bom 405=9 Bom L R 542.
17. (1690) 2 Vern 187.
18. (1801) 6 Ves 52.

afterwards. Sabu therefore could have maintained a suit to recover the properties comprised in the deed of gift. The deed of gift was invalid under S. 6 (h), T. P. Act, and the principle of equity enunciated in the decision in the case of *Ayerst* v. *Jenkins* (9) would not have come in his way as the immoral object was not carried out. He could therefore have maintained a suit for recovery of the properties comprised in the deed of gift. If this view is correct, the plaintiff, as his adopted son, is entitled to recover the properties.

The case of *Ram Sarup* v. *Bela* (19) is distinguishable on its special facts as the gift in that case was made to the mistress and her children, and it was difficult to distinguish the gift to the woman from the gift to the children and the gift to the woman was considered to rest on the valid and moral consideration on which it was stated to rest at the time. It was held by the Judicial Committee that the gift was unconditional and even if it was otherwise, the gift to which an immoral condition was attached remained a good gift, while the condition was void. In the lower Court an attempt was made by the plaintiff to impeach the deed of gift on the ground of undue influence. It appears that on that day Sabu passed a sale deed, Ex. 66 in favour of one Shidappa. I agree with the finding of the lower Court that defendant 1 did not dominate the will of Sabu, and that the deed of gift was not induced by undue influence. With regard to survey No. 181 in the possession of defendant 2 and survey No. 336 in the possession of defendants 3 and 4, I agree with the finding of the lower Court that defendant 2 improved the land in his possession after an expenditure of Rs. 1,000, and defendants 3 and 4 also improved certain portions of survey No. 336 after an expenditure of Rs. 400 each. The evidence in the case supports the finding of the lower Court on this point. I think therefore that the view of the lower Court, that the plaintiff is entitled to get back the properties comprised in the deed of gift which are in the possession of defendant 1, is correct. The view of the lower Court that the plaintiff is entitled to recover possession of survey No. 181 from defendant 2 on payment of Rs. 1,000 and survey Nos. 336/1 and 336/2 from defendants 3 and 4 on payment of .Rs. 800 is also correct in the circumstances of this case. The result therefore is that both the appeals are dismissed with costs and the cross-objections are dismissed with costs.

19. (1883) 6 All 313=11 I A 44=4 Sar 493 (P C).

Barlee, J.—I agree that both appeals must be dismissed, but I reach this conclusion by a different path and shall therefore give my reasons as shortly as possible. The questions to be answered in these appeals are: (1) Whether the deceased Sabu transferred land to the defendant Sabava in 1903, when he executed a sale deed in her favour; and in 1917, when he and his wife executed a deed of gift. This is important because of the plea that the documents were never acted on, for, if that were the case, there would be no effective defence of limitation; (2) if it be found that the lands were in fact transferred to Sabava we have to decide whether they were transferred for consideration, and what it was in either case; (3) whether the consideration, if any, was unlawful; (4) whether the transferor, had he lived would have been estopped from pleading that the consideration was unlawful, and whether his representative in interest is in no better case. (After setting out the fact and discussing the evidence, the judgment proceeded). The learned Subordinate Judge has held that inasmuch as Sabava was in adverse possession of the lands conveyed in 1904 for 26 years before suit, the plaintiff cannot now claim them (Art. 144). On his behalf it is argued that Sabu was all along in possession. But, as the learned Subordinate Judge has said, the indicia of possession were with Sabava, as the lands were entered in her name in the Record of Rights; and I must add that the present argument is inconsistent with the case which has been pleaded that Sabava had great influence with Sabu and used it to feather her nest. If in 1904 she persuaded him to convey lands to her it is probable that she took care to enter on possession. It is not the plaintiff's case that the transfer was nominal to conceal Sabu's interest. He was not pressed by creditors and had no apparent object in preparing a false document. It may be that he gave her the sale deed to enable her to make a claim after his death, and still remained

in effective possession; but it was for the plaintiff to establish this fact, if true, and he has not done so.

The principal contention in this Court has reference to the document of 1917, which purported to be a deed of gift. It has been faintly argued that concubinage is not an unlawful consideration inasmuch as it is recognized by Hindu law. But we cannot accept this view. I do not press the point that the concubinage had probably at one time been adulterous, for Sabava's husband died at least 12 years before the conveyance. But I know of no rule of Hindu law which legalizes concubinage. The best that can be said is that Hindu law entitles a concubine in certain circumstances to maintenance out of the estate of her paramour, and that is a very different thing. As pointed out by Macleod, C.J. the maintenance of a discarded concubine is not an unlawful object, but it does not follow that concubinage is not immoral: *Husseinali* v. *Dinbai* (4). The argument seriously pressed on us is that S. 6 (h), T. P. Act, has no application to gifts inasmuch as a gift is a transfer of property without consideration. Since a donee has not to prove consideration it does not matter, it is said, whether the motive of the gift be good or bad. The first part of this argument can be answered in a few words. The Transfer of Property Act mentions four or five classes of conveyances, but obviously the list is not complete for there is no mention of the very usual form of conveyance of which the consideration is not cash but some sort of service, e.g., a conveyance made in discharge of a liability to provide maintenance which was the subject-matter of the Full Bench case, *Madam Pillai* v. *Badrakali Ammal* (20), or a conveyance made in discharge of a contract. It follows then that we are not bound to decide that the conveyance in suit was a gift because it is called a gift. In fact this argument begs the question.

The next question is more difficult to answer. And here my path diverges from that taken by my learned brother. If there was consideration in our case, it was past or future service. If it was future service the way is clear, for future cohabitation was beyond doubt an immoral object. But I find myself unable to accept the view that the parties were contemplating future illicit intercourse. It is true that they did not contemplate separation; but future concubinage is not the same as future residence, and since Sabu was old or elderly and admittedly very ill and Sabava was 47 years of age, I think they were making arrangements for the time when she would be left alone. That was not an unlawful object. I am therefore compelled to examine the evidence with a view to determine whether, as alleged by the plaintiff, past intercourse was the consideration of the agreement or merely the motive. The real question at issue is then one of fact. What I have to discover is whether the past concubinage was merely the motive for the gift or whether a promise was made by Sabu to Sabava in return for it so as to constitute an agreement. If there was an agreement it would obviously have been unenforceable; and, since S. 23, Contract Act, has been incorporated in the Transfer of Property Act, the conveyance made in discharge of the agreement was invalid. If, on the other hand, there was no promise which linked the past concubinage with the conveyance, the latter is unimpeachable. (After considering the evidence, the judgment proceeded). A number of cases have been cited as authorities on the question of the effect of a conveyance in consideration of con cubinage, but unfortunately there is but one in which the facts were similar to those of this case, and in that case the decision was on another ground and we find a mere expression of opinion: *Kisandas* v. *Dhondu* (3). The only other case of this Court, *Husseinali* v. *Dinbai* (4), was one of contract and not of conveyance. In *Thasi Muthukannu* v. *Shunmugavelu Pillai* (10) a mortgage was assigned with the object of future illicit intercourse; and in *Deivanayaga Padayachi* v. *Muthu Reddi* (12) there was a settlement of land with the object of or in consideration of a promise of future illicit intercourse. In *Brahmayya Lingam* v. *Mallamma* (14) there was a conveyance in consideration of past and future cohabitation. Lastly, there are two Allahabad cases: *Dhiraj Kuar* v. *Bikramajit Singh* (1) and *Lachmi Narain* v. *Wilayti Begam* (21). But these

20. A I R 1922 Mad 311=68 I C 687=45 Mad. 612 (FB).

21. (1879) 2 All 433.

were decided prior to the Transfer of Property Act and cannot help us in intrepreting its provisions.

The last question is that of estoppel. Reliance is placed on the English case of *Ayerst* v. *Jenkins* (9), for the rule that an agreement for an unlawful object is irrevocable if the unlawful object be fulfilled. This principle has been adopted by this Court in connexion with conveyances in fraud of creditors: *Sidlingappa* v. *Hirasa* (16). It rests on the ground of estoppel: see *Deivanayaga Padayachi* v. *Muthu Reddi* (12). But in this case, if the facts are as found by the trying Judge, I cannot see that there is any reason for the application of that principle. Sabava did not allow illicit intercourse on the strength of a promise of these lands; or, if she did, as my learned brother has held, the unlawful purpose was not carried out since it is admitted that Sabu never recovered from his illness. My conclusion, then, is that the older transaction is unimpeachable because of adverse possession, but the so-called gift of 1917 was void and can be set aside or ignored. I agree that both appeals and cross-objections must be dismissed with costs.

K.S. *Appeals dismissed.*

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* A. I. R. 1933 Bombay 217

PATKAR AND MURPHY, JJ.

Hamidmiya Sarfuddin and *others*—Plaintiffs—Appellants.

v.

Nagindas Jivanji and *others*—Defendants—Respondents.

First Appeals Nos. 434 and 435 of 1926, Decided on 16th September 1932, from decision of First Class Sub-Judge, Surat, in Special Regular Civil Suit Nos. 588 and 587 of 1924.

(a) Attestation—Mere attestation does not import knowledge of contents.

Mere attestation cannot necessarily import knowledge of the contents of the document much less can it amount to a sanction of the alienation. [P 220 C 1]

(b) Mahomedan Law—Religious institution —Khanka—What it is, explained.

A Khanka is a monastery or religious institution where dervishes and other seekers after truth congregate for religious instruction and devotional exercises. The Khanka is usually under the governance of the sajjadanashin (one seated on the prayer mat), who not only acts as the muttawali (or manager) of the institution and the adjoining mosque but also is a spiritual preceptor of the adherents: 6 *Bom L R* 1058; 19 *Cal* 203 and *A I R* 1922 *P C* 123, *Ref.* [P 220 C 2]

*** (c) Mahomedan Law—Religious institution — Alienation made by muttawali — Art. 134, of Limitation Act does not apply—Limitation Act, (1908), Arts. 134 and 144.**

A Muttawali is not a trustee with regard to the property of the institution save as to specific property proved to have vested in him for specific purpose. Hence a suit to set aside alienation by muttawali is governed by Art. 144 and not by Art. 134, Lim. Act: *A I R* 1922 *P C* 123, *Foll.* [P 221 C 1]

(d) Limitation Act (1908), Art. 144—Possession of distinct trespassers cannot be tacked for adverse possession.

In order to constitute adverse possession, possession of distinct trespassers cannot be tacked on as the distinct trespassers cannot be deemed to claim through each other: *A I R* 1921 *Bom* 48 and *A I R* 1917 *P C* 18, *Ref.*; *A I R* 1922 *Mad* 59, *Dist.* [P 221 C 1]

***(e) Limitation Act (1908), Art. 144—Sale or mortgage of endowment property by muttawali—Limitation to recover property runs from date of alienation—Difference in case of lease pointed out.**

In the case of a permanent lease by a muttawali, limitation for a suit to recover the property would not run until the death of manager or until his removal; in the case of a sale or mortgage by the muttawali the limitation would run from the date of the alienation, when the possession of the alienee becomes adverse to the institution: *Case law discussed.* [P 224 C 1]

(f) Mahomedan Law—Religious institution —Alienation by Muttawali not for necessity is not binding on institution.

An alienation by a muttawali which is not effected for a necessity is not binding on the institution unless the alienation is validated by lapse of time under Art. 144, Lim. Act. [P 225 C 1]

(g) Mahomedan Law—Religious institution —Sale by muttawali—Part of consideration for paying off valid debt—Sale is valid to that extent.

Where in a sale by a muttawali, part of consideration is found to have been used for the payment of a valid debt, the sale must be held valid to that extent and it can be set aside only on the institution paying that amount. [P 225 C 2]

M. B. Dave, *M. R. Jayakar* and *R. W. Desai*—for Appellants.

G. N. Thakor, *N. N. Mazumdar*, *H. V. Divatia* and *H. C. Coyajee*—for Respondents.

Patkar, J.—These appeals arise out of Suits Nos. 588 of 1924 and 587 of 1924. Suit No. 588 of 1924 relates to two mortgages: (1) Ex. 160, dated 31st October 1912, in favour of defendants 1, 2 and 3 for Rs. 15,000 passed by defendant 4 the muttawali of the properties attached to the Juma Masjid and the dargas of Nasiruddin and Abdul Hamid situated at Navsari; and (2) Ex. 159, dated 17th March 1910, in favour of defendant 1

and father of defendants 2 and 3 passed by defendant 4 for Rs. 1,500. The companion Suit No. 587 of 1924 relates to a sale deed dated 31st July 1918 for Rs. 6,845, Ex. 124, passed by defendant 4 and his mother. The plaintiff is now appointed a muttawali of the wakf property and plaintiffs 2 and 3 are the trustees of the mosque in the Baroda territory to which the wakf relates. Defendants 1 to 3 are the mortgagees under the mortgage deeds, Exs. 159 and 160 in Suit No. 588 and defendant 8 is another mortgagee of the equity of redemption under Ex. 161, dated 28th September 1916. The companion suit relates to the sale deed passed in favour of the alienee. Both the suits are for recovery of possession of the property described in the plaints and for redemption of the mortgages if they are held binding on the wakf property. The Masjid and the dargas are situate at Navsari in the Baroda territory outside British India. The lands in suit relating to the wakf are situated at Mogar in the District of Surat, in Jalalpur taluka. The defendants contended that they are bona fide purchasers for value and the suit was barred by limitation.

The learned Subordinate Judge held that the wakf was proved and that the properties in suit related to the wakf, and the mortgages were invalid but Rs. 4,000 out of the consideration for the sale deed was for a necessary purpose, but he held that as the muttawali defendant 4 was removed from office by the Baroda Government in 1910 the suits were barred by limitation. On appeal it is contended on behalf of the appellants that the view of the lower Court on the point of limitation is erroneous. The respondents contended that the finding, that the suit properties were wakf and that the alienations were invalid, was erroneous and also relied on the plea of limitation. The questions therefore arising in the appeals are; (1) whether the finding of the lower Court that the properties in suit related to wakf is correct and whether the alienations are invalid; and (2) if so, whether the alienees acquired title by adverse possession. The learned Subordinate Judge held that the mortgages, Exs. 159, 169 and 161, were invalid as they were not for a necessary purpose, but the sale in the companion suit, Ex. 124, was valid to the extent of Rs. 4,000 borrowed for the purposes of the wakf. The sale deed is within twelve years before suit; the mortgage, Ex. 159 of 1910, is beyond twelve years before suit and the mortgages Exs. 160 and 161, are within twelve years before suit which was filed on 27th September 1924.

The first question arising in the case is whether there was a proper dedication to the wakf and whether the properties in suit related to the wakf. (After discussing questions of fact, the judgment proceeded). It appears clear from these facts that the properties in suit were agreed by the descendants of the original grantees to be dedicated to the wakf, i. e., the Masjid and the dargas, and that defendant 4's father was appointed sajjadanashin and muttawali of the wakf property situate at Mogar. . . I therefore agree with the view of the lower Court that the wakf to the Masjid and the dargas situate at Navsari in respect of the land in suit is clearly proved. I shall now deal with the several alienations with which we are concerned in this appeal and also the previous alienations connected with the alienations in suit. 452½ bighas, of which a sanad was given in favour of the father of defendant 4 by Ex. 46, related to the wakf. It appears that the father of defendant 4 concealed the fact that the land related to the wakf when he obtained the sanad in his name, and as the grant to the wakf was not made by the British Government or by any former Government, but was a result of an agreement between the descendants of the original grantees, the sanad, Ex. 46, appears to have been made in the name of the father of defendant 4. It is clear however from the evidence that these lands at Mogar related to the wakf. The 452½ bighas consisted of three parts: (1) 397½ bighas; (2) 33½ bighas; and (3) 24½ bighas.

I shall deal with the alienations in respect of the first portion of the land consisting of 397½ bighas. The first document is Ex. 128, dated 16th August 1892, for Rs. 11,000. It refers to a previous mortgage of 1881-82 in favour of Shah Nagindas Jivan, manager of the shop of Shah Jivan Pragji. The money is said to have been borrowed for satisfaction of Rs. 8,000 on the previous mortgage of 1881-82 and Rs. 2,890 to redeem the

Navsari house and Rs. 110 for stamp. It does not appear that any portion of the amount was borrowed for the purposes of the Masjid or the wakf. The mortgage was in favour of Jivan Pragji, the father of defendant 1. The next mortgage in regard to the same plot of land is Ex. 157 for Rs. 13,000 on 12th November 1900. The consideration is for payment of Rs. 12,600 on account of the previous mortgage, Ex. 128, and Rs. 400 in cash. It is passed in favour of the same mortgagee Nagindas Jivanji, defendant 1, by the father of defendant 4. The next mortgage is Ex. 156, dated 6th June 1905, in favour of defendant 1 for Rs. 2,200 by way of a further charge. The amount is said to have been taken to pay off a mortgage in favour of another person, Panubhai Anupram, and for payment of other creditors. There is no recital that the amount was borrowed for the purposes of the Masjid or the dargas. The property in Exs. 156 and 157 is 391 odd bighas out of the 397½ bighas comprised in the mortgage Ex. 128. The next mortgage is Ex. 158 by defendant 4 of 20th October 1906, after the death of his father Nanumiya in 1901 for Rs. 15,000 in favour of one Nemchand Fakirchand who was related to defendant 1 by marriage being his Vewai. Rs. 15,000 were borrowed for paying off the previous mortgages in favour of defendant 1, Exs. 157 and 156. The document, Ex. 158, is dated 20th October 1906, and was registered on 27th October 1906, and the amount was paid off on 27th October 1906, to defendant 1. The mortgages, Exs. 156 and 157, bear endorsements of payment dated 27th October 1906. The next mortgage is Ex. 160 dated 31st October 1912, in favour of defendant 1, Nagindas Jivanji, and as guardian of his minor nephews: defendants 2 and 3, for Rs. 15,000. The amount is borrowed for paying the mortgage, Ex. 158 in favour of Nemchand. The document, Ex. 158, bears an endorsement of payment dated 31st October 1912. Ex. 160, dated 31st October 1912, for Rs. 15,000 in favour of defendant 1 and defendants 2 and 3 is one of the mortgages, the subject-matter of Suit No. 588. It is within 12 years of the institution of the suit. The next mortgage is Ex. 161 dated 28th September 1916, under which the equity of redemption is mortgaged to defendant 8 for Rs. 5,999. It is within 12 years of the institution of the suit and forms the subject-matter of Suit No. 588. The consideration is stated to be for payment of the debt and for the expenses of the litigation in tha Mulki Khata at Baroda.

The second portion of the land relating to the wakf consists of 33½ bighas and I shall deal with the alienations relating to that portion. The first alienation is mortgage, Ex. 126, passed by the father of defendant 4 on 10th June 1865, for Rs. 4,000 in favour of Vallabh Lallu and Prag Khushal. The next mortgage is Ex. 125 dated 28th May 1898, by the father of defendant 4 in favour of Umedram Occhavram for Rs. 4,500. The amount was borrowed to pay off the mortgage in favour of Vallabh Lallu, Ex. 126. Ex. 126 bears an endorsement of payment dated 28th May 1898. The last alienation in respect of this portion of the wakf land is Ex. 124, the sale deed passed on 31st July 1918, in favour of the defendants in the companion Suit No. 587 by defendant 4 and his mother after the death of his father for Rupees 6,845. The previous mortgage in favour of Umedram Occhavram, Ex. 125, was satisfied out of the consideration money received from the defendants in Suit No. 587. The mortgage, Ex. 125, bears an endorsement of satisfaction dated 2nd August 1918.

The third portion of the wakf land of Mogar consists of the 24½ bighas which was mortgaged on 17th March 1910 by Ex. 159 in favour of defendant 1 and the father of defendants 2 and 3 by defendant 4 for Rs. 1,500. All the three pieces, which I have referred to, namely, 397½ bighas, 33½ bighas and 24½ bighas with slight variations in the area make up 452½ bighas comprised in the sanad, Ex. 46, and relate to the wakf. We are concerned in Suit No. 588 with the three mortgages, Ex. 159 dated 17th March 1910, with regard to 24½ bighas; and Ex. 160 and Ex. 161 in respect of 391 odd out of 397½ bighas, Ex. 160 dated 31st October 1912, in favour of defendant 1 and his nephews defendants 2 and 3, and Ex. 161 dated 28th September 1916, the mortgage of the equity of redemption in favour of defendant 8. Suit No. 581 is therefore concerned with the three mortgages, Exs. 159, 160 and 161, Ex. 159 being more than twelve years before suit, and Exs. 160 and 161,

being within twelve years before suit, and in Suit No. 587 we are concerned with the sale deed, in respect of 24½ bighas, Ex. 124, dated 31st July 1918, which is within 12 years before the institution of the suit.

It is not necessary to go into the question whether the muttawalis could validly mortgage wakf property on the strength of a local custom in Broach and Surat Districts as held in *Abas Alli* v. *Ghulam Muhammad* (1) and *Krishnarav Ganesh* v. *Rangrao* (2). No such local custom has been alleged or proved in this case. I may refer in this connexion to the case of *Narayan* v. *Chintaman* (3). It is also suggested that the attestation of the Kazi on some of the mortgages would validate the mortgages, but it does not appear whether the attestor signed in his capacity of a Kazi. Mere attestation cannot necessarily import knowledge of the contents of the document; much less can it amount to a sanction of the alienation. The learned Subordinate Judge held that the mortgages, Exs. 159 169 and 161, were not effected for necessary purposes binding on the wakf and that out of the consideration for the sale deed of Ex. 124 Rs. 4,000 were borrowed in 1865 for a purpose which was binding on the religious institution. The learned Subordinate Judge held that the suit was not barred under Art. 134, Lim. Act, as defendant 4 or his father was not a trustee in whom the estate was vested and that the suit was nct barred under Art. 144, Lim. Act, because the several mortgagees, being trespassers could not tack on their possession to each other and there was no continuous adverse possession for more than 12 years, but held that the suit was barred by limitation on the ground that defendant 4 was removed from the muttawaliship in the year 1910 by the Baroda Government by order of the Subha and his possession was adverse for more than 12 years and therefore both the suits were barred by limitation as they were not brought within 12 years from the date when defendant 4 was removed from his muttawaliship by the Baroda Government.

It appears from the partition-decree, Ex. 101 of 1829, that the lands in suit were set apart for the purpose of the khanka and for the Masjid and the dargas of the two males, and that defendant 4 was sajada or sajjadanshin and also muttawali. There is no evidence of maintenance of a khanka in the Surat District or in the Baroda territory. There is clear evidence as to the existence of a Masjid and dargas at Navsari and the lands having been set apart for their use. Though a khanka may be in existence at the time of the partition deed, there is no clear evidence on the record to show that the khanka was continued in recent times. Defendant 4's grandfather and his father and afterwards defendant 4 were sajjadanshin of the khanka and also muttawalis of the wakf properties. In *Muhammad Hamid* v. *Mian Mahmud* (4), after referring to the case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (5), it was held that a sajjadanashin had a larger right in the surplus income than the muttawali, but it did not mean that the whole income from the khanka was at the disposal of the sajjadanashin. In the present case there is no clear evidence of any maintenance of a khanka. A khanka is a monastery or religious institution where dervishes and other seekers after truth congregate for religious instruction and devotional exercises. The khanka is usually under the governance of the sajjadanashin (one seated on the prayer mat), who not only acts as the muttawali (or manager) of the institution and the adjoning mosque, but also is a spiritual preceptor of the adherents. The origin and history of the shrines and dargas and the duties and functions of sajjadanashin and muttawali have been described in the decisions in the cases of *Zooleka Bibi* v. *Zunul* (6) and *Piran* v. *Abdool Karim* (7) approved by the Privy Council in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (5).

In *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (5) it was held that the endowments of a Hindu mutt are not conveyed in trust nor is the head of the mutt a trustee with regard to them, save as to specific property proved to have been vested in him for a specific object, and that Art. 134, Lim. Act, would not apply,

1. (1863) 1 B H C R 36.
2. (1867) 4 B H C 1.
3. (1881) 5 Bom 393.
4. A I R 1922 P C 384=50 I A 92=4 Lah 15 =77 I C 1009 (P C).
5. A I R 1922 P C 123=48 I A 302=44 Mad 831=65 I C 161 (P C).
6. (1904) 6 Bom L R 1058.
7. (1891) 19 Cal 203.

and that the same rule applies to the endowments of Mahomedan religious institutions and to alienations made by the sajjadanashin or muttawali. There is no specific trust in this case, nor is it proved that any specific property was vested in defendant 4's grandfather for a specific object, and therefore Art. 134, Lim. Act, would not apply. The article therefore applicable to the present case is Art. 144, Lim. Act.

The learned Subordinate Judge held that the different alienees were distinct trespassers, and the possession of the previous mortgagees could not be tacked. Under Art. 144, Lim. Act, the starting point for limitation is the date from which the defendant's possession becomes adverse, and according to the definition of "defendant" in the Limitation Act "defendant" includes a person from whom the defendant claims. The distinct trespassers could not be said to claim through each other, and therefore the possession of the distinct trespassers could not be tacked on in order to constitute adverse possession. The defendant therefore cannot take advantage of the possession of others before him unless they are persons from whom he derives his title: see *Ramchandra Balwant* v. *Balaji Ganesh* (8) and *Kumar Basanta Roy* v. *Secy. of State* (9).

It is urged on behalf of the appellants, relying on the decision in the case of *Ramayya* v. *Kotamma* (10), that adverse enjoyment of immovable property for over twelve years, whether by a single person or by several persons in succession, even though they do not claim from one another, provided it is continuous and without a break, bars the true owner under Art. 142, Lim. Act. It appears from the evidence in the case that the mortgages effected by defendant 4's father were redeemed by him and subsequent mortgages were effected. Similarly defendant 4 redeemed the previous mortgages and effected subsequent alienations and paid off the previous mortgages. It was held in the case of *Mohesh Lal* v. *Mohunt Bawan Das* (11) that it must be presumed, in the absence of an express intention to the contrary, that when one, claiming to be owner of an estate, borrows money to pay off a mortgage, there being no intermediate encumbrance, he intends to extinguish it, and it was observed at p. 71 (of 10 *I. A.*) as follows:

> "Although the money was paid by the plaintiff's gumasta to Luchmi Narain's estate, it was paid with money borrowed from the plaintiff by Mungal, and for which Mungal was liable to him. The mortgage was therefore paid off by Mungal and not by the plaintiff."

It is clear therefore, having regard to the evidence in the present case, that the previous encumbrances were paid off by the then muttawali by borrowing money on subsequent mortgages, and the previous mortgages were extinguished, and therefore it cannot be said that there were several trespassers in succession continuously and without a break for more than twelve years. It is therefore unnecessary to examine the case of *Agency Co.* v. *Short* (12) and *Willis* v. *Earl Howe* (13), on which the decision in *Ramayya* v. *Kotamma* (8) is based. I think that Art. 142 does not apply to the facts of the present case. As defendant 4 was a mutawalli, i.e., manager, of the religious institution and was not a person in whom the property has vested in trust, it would follow, according to the decision in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (5), that the article applicable is not Art. 134, but Art. 144, Lim. Act.

The learned Subordinate Judge held that the possession of defendant 4 after 1910, the date of the decision of the Subha at Navsari, was adverse, and the suit not having been brought within twelve years from the decision of the Subha on 8th January 1910, the claim is barred by limitation. The learned Judge at one place stated that the suit was not barred by Art. 144, Lim. Act and at another place held that it was barred by Art. 144, Lim. Act.

As I understand the reasoning of the learned Subordinate Judge, he was of opinion that the suit was not barred under Art. 144 by adverse possession on the part of the alienees, but was barred by adverse possession of defendant 4 after he was removed from office on 8th January 1910. It is difficult to support

8. A I R 1921 Bom 48=45 Bom 570=59 I C 805.
9. A I R 1917 P C 18=44 I A 104=44 Cal 858 =40 I C 337 (P C).
10. A I R 1922 Mad 59=45 Mad 370=67 I C 246.
11. (1883) 9 Cal 961=10 I A 62=13 C L R 221 (P C).
12. (1888) 13 A C 793.
13. (1893) 2 Ch 545

the reasoning of the learned Subordinate Judge on this point. Under Ex. 130 defendant 4 was not removed from his position. The order gave him locus penitentiae and if he passed a kabuliyat he was to be restored to possession, otherwise plaintiff 1 was to pass a kabuliyat and take possession of the property. The order of the Huzur, Ex. 133, was passed on 16th June 1913, and it appears from the facts which I have already mentioned, that defendant 4 applied to the Subha by Ex. 119 and agreed to accept the management and did not set up any adverse claim and admitted that he was a muttawali from his ancestors. The Subha allowed him to continue in possession till 4th August 1916, when he was finally removed, and plaintiff 1 was put in possession in 1917.

Even assuming that defendant 4's adverse possession commenced from 1910 by the order of the Subha, there was a break in the adverse possession as he passed a kabuliyat and admitted the title of the mosque and was allowed to continue in possession from 1915 to 1916 and afterwards the possession was given to plaintiff 1. I think however that the Baroda order did not, and was not intended to, affect the property in Mogar in British India. Subsequently proceedings were taken in respect of the properties in suit No. 19 of 1919 before the District Judge of Surat and defendant 4 was removed from office on 14th December 1920, by Ex. 63, and the order was confirmed by the High Court by Ex. 64 on 7th November 1922. Therefore so far as the property in suit situate at Mogar in British India is concerned, it cannot be held that defendant 4 was removed from his office before 1920 and the suit was brought soon afterwards in 1924. The reasoning of the learned Judge therefore on this point cannot, in my opinion, be accepted. The next question is whether the claim of the religious institution is barred by adverse possession of the alienees. It is contended on behalf of the appellants that the claim is not barred by adverse possession on the ground that defendant 4 was removed from office so far as the Mogar property was concerned in 1920 and the suit is brought within 12 years from that date, and reliance has been placed on the decision in the case of *Vidya Varuthi Tirtha* v. *Balusami Ayyar* (5). On the other hand it is contended that adverse possession commenced not from the removal from the office of muttawali or from his death, but from the date of the alienation; and reliance is placed on the decision in the case of *Damodar Das* v. *Lakhan Das* (14).

By Act 1 of 1929, S. 10 of the Lim. Act, has been amended and new articles 48-B, 134-A, 134-B and 134-C, have been enacted, but the present case is governed by the Limitation Act before it was so amended. Art. 144 was applied in the alternative in the case of a sale by a hereditary manager of a religious foundation in the case of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (15), which related to a sale of hereditary right of management and transfer of endowed property. The view of applicability of Art. 144 and commencement of adverse possession from the date of alienation was re-affirmed by their Lordships of the Privy Council in *Damodar Das* v. *Lakhan Das* (14). Limitation was held to run from the date of the alienation under Art. 144, Lim. Act. An attempt was made by Das, J., to reconcile the apparently conflicting views in the above Privy Council decisions in the case of *Ramrup Gir* v. *Lal Chand Marwari* (16), by suggesting that limitation would run from the date of the alienation when the mahant is only the representative and manager of the idol, the act of the alienation being a direct challenge upon the title of the idol; but where the title is in the mahant or shebait, the act of the alienation is not a challenge on the title of the idol and there would be no adverse possession so long as the person making the alienation was alive. The distinction so drawn by Das, J., does not appear to have been definitely adopted by the Privy Council when the case went up in appeal in *Lal Chand Marwari* v. *Ramrup Gir* (17). It was observed as follows (p. 35 of 53 *I. A.*):

"Whether, in other words, the case is governed by the decisions of which *Damodar Das* v. *Adhikari Lakhan Das* (14) may be taken as the leading authority; or by the line of authority of which *Vidya Varuthi Thirtha* v. *Balusami*

14. (1910) 37 Cal 885=7 I C 240=37 I A 147 (PC).
15. (1899) 23 Mad 271=27 I A 69=7 Sar 671 (PC).
16. A I R 1922 Pat 243=67 I C 401=1 Pat 475.
17. A I R 1926 P C 9=93 I C 280=53 I A 24=5 Pat 312 (PC).

Ayyar (5) may be taken as typical their Lordships, while not pronouncing upon it, have given very careful consideration to this interesting and difficult question. Upon it they say no more than this: that they must not be taken to accept the view with reference to it propounded by the High Court. So far as they are concerned the question remains entirely open to be determined when it arises."

Till the matter is finally decided by the Privy Council the question is still open. Various lines of reasoning were adopted by the different High Courts to reconcile the clevage of opinion reflected in the two Privy Council decisions. In *Manindra Narayan Roy* v. *Sarat Chandra* (18) the distinction between a permanent lease and a sale was emphasized and the decision in *Vidya Varuthi's* case (5) was considered as confined to a permanent lease on the ground that the possession of the lessee cannot be adverse so long as the tenancy continues, and it is only when the tenancy comes to an end that the possession of the lessee becomes adverse, and such a rule cannot be applied in the case of a sale. In *Rama Reddy* v. *Rangadasan* (19) it was held that Art. 144 did not apply to a case of alienation by a trustee where the alienee derived possession from the trustee, and that consequently the suit could not be barred by limitation on the ground that an idol or a math is under a perpetual disability and that prescription does not run against a person who is unable to act and an idol is entitled to some protection if it happens to be represented by a person who cannot and will not act in the interest of the idol. The theory of an idol being a perpetual minor or under a permanent disability has been criticized by the Allababad High Court in *Chitar Mal* v. *Panchu Lal* (20), and there is considerable force in the criticizm disclosed in that judgment.

In *Naurangi Lal* v. *Ram Charan Das* (21), the case of *Vedya Varuthi Thirtha* v. *Balusami Ayyar* (5) was considered to be confined to a case of a lease and it was held that a distinction must be drawn between a permanent lease and a sale, and that where a mahant or a shebait completely transfers an endowed property to a stranger, the period of limitation for a suit to recover that property begins to run from the date of the alienation, when the possession of the alienee becomes adverse to the idol or math under Art. 144. This view derives support from the judgment of Lord Buckmaster in *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar* (22), where the argument that the period of limitation begins to run afresh as each new trustee succeeds to the office, based on the decisions of the Privy Council in *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (23) and *Vidya Varutht Thirtha* v. *Balusami Ayyar* (5), has been answered on the ground that those cases related to the effect of an attempt on the part of a trustee to dispose of the property by a permanent mukarrari lease, and it was remarked that in the case of a permanent lease the possession given in the lifetime of the trustee was not adverse and upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate and such an argument had no relation to cases where the property had been acquired under an execution sale and possession retained throughout, and it was further observed that there was little difference in principle between a transfer under an adverse execution and a sale by the trustee himself, and that Art. 144 covered the exact case.

In *Abdur Rahim* v. *Narayan Das Aurora* (24), which related to a mortgage by the former muttawali, it was contended that the mortgagee was entitled to have a charge declared on the portion of the property which was settled for the benefit of the settlor's family, and it was held that the whole mortgage failed and no part of the property held in wakf is chargeable, and on the question of limitation it was held as the former muttawali was in possession within 12 years before, the claim was not barred. It was found in that case that the mortgagee did not get possession and as the mortgagor, the former muttawali was in possession within 12 years before suit, the suit was not barred by limitation. It would there-

18. A I R 1926 Cal 913=95 I C 644.
19. A I R 1926 Mad 769=96 I C 371=49 Mad 543.
20. A I R 1926 All 392=93 I C 652=48 All 348.
21. A I R 1930 Pat 455=127 I C 817=9 Pat 885.
22. A I R 1923 P C 175=74 I C 492=50 I A 295=46 Mad 751 (P C).
23. (1911) 38 Cal 526=10 I C 683=38 I A 76 (P C).
24. A I R 1923 P C 44=71 I C 646=50 I A 84=50 Cal 329 (P C).

fore follow that different considerations would prevail if the mortgagee from the former muttawali had obtained possession for more than 12 years before suit. It appears that as manager the muttawali has a right to let the lands by a yearly lease or by a permanent lease, and the tenant, whether for a period or in perpetuity, cannot during the lifetime of the manager of a religious institution set up an adverse title when he pays rent to the manager, and the possession of such a tenant cannot be adverse till the death of the manager or his removal from office. In the case of a sale different considerations arise. From the date of the alienation the property is lost to the institution, and there is no conduct on the part of the alienee which would indicate that his possession is on behalf of the institution as in the case of a permanent lessee who admits the title of the institution, by payment of rent to the manager. Therefore in the case of a permanent lease limitation would not run until the death of the manager or until his removal. I think therefore that in the case of a sale by the muttawali the limitation would run from the date of the alienation.

In Appeal No. 434 of 1926 we have to deal with three mortgages, Exs. 159, 160 and 161, dated 17th March 1910, 31st October 1912 and 28th September 1916 respectively. In the companion Appeal No. 435 of 1926, we have to deal with the sale-deed, Ex. 124, dated 31st July 1918. The finding of the lower Court with regard to the mortgages, Exs. 159, 160 and 161, is that they are not for necessary purposes, binding on the institution. Ex. 159, dated 17th March 1910, is more than 12 years before the date of the institution of the suit, while Exs. 160 and 161 are within 12 years before suit. As I have already held, the new mortgages were fresh transactions though the money borrowed went in payment of the previous mortgagos which were extinguished. The question therefore is whether a mortgage stands in the same position as a sale or a permanent lease so far as the power of the manager of a religious institution is concerned. In the case of a mortgage, the equity of redemption resides in the institution, and in one sense it resembles a permanent lease in that it is not a complete alienation of the property. On the other hand under S. 105, T. P. Act a lease is a transfer of the right to enjoy immovable property, while a sale under S. 54 is a transfer of the ownership, and under S. 68 a mortgage is a transfer of an interest in specific immovable property. So far as it is the transfer of interest in immovable property and not merely transfer of the right of enjoyment of the property, it resembles an alienation by way of sale.

A distinction is drawn by the Judicial Committee between a sale or an absolute assignment and a permanent lease for purpose of adverse possession in respect of watan lands in the case of *Madhavrao Waman* v. *Raghunath Venkatesh* (25). According however to the decision of the Full Bench in *Bhavrao* v. *Rakhmin* (26) there is no distinction between alienations by way of mortgages and sales for the purposes of adverse possession in a suit for partition of joint family property and it was observed as follows (p. 141) :

"Nevertheless his exclusive possession does not on that account cease to be adverse. He, entering as owner, his possession must, we think necessarily be adverse to the true owners. Adverse possession depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested—whether in a single person or in many jointly."

According to the decision in *Ramchandra Venkaji* v. *Kallo Devji* (27), which relates to mortgage of watan land, a mortgagee from a muttawali or manager of a religious institution would remain a mortgagee, and would acquire by adverse possession the limited interest to which he is entitled, namely, that of a mortgagee. The adverse possession, in my opinion, would commence, as in the case of a sale, from the date of the mortgage. I think therefore that the mortgage, Ex. 159, dated 17th March 1910, is binding on the institution as it is more than 12 years before suit, and the plaintiffs cannot recover possession of the property without paying the amount secured on the mortgage. With regard to Ex. 160, dated 31st October 1912, it is within 12 years before the institution of the suit and I agree with the finding of the lower Court that the mortgage was not effected for a necessary

25. A I R 1923 P C 205=74 I C 362=50 I A 255=47 Bom 798 (P C).
26. (1898) 23 Bom 137 (F B).
27. (1915) 39 Bom 587=30 I C 396.

purpose. It is not binding on the institution on the ground that it is not supported by necessity and also on the ground that it is not validated by lapse of time under Art. 144, Lim. Act. The third mortgage, Ex. 161, dated 28th September 1916 is merely a mortgage of the equity of redemption to defendant 8 who had not possession of the property. It is found that it is not supported by any necessity and is also within 12 years before suit. It is therefore not binding on the institution.

In the other suit, No. 587, the sale-deed, Ex. 124, is dated 31st July 1918, and is in respect of 33½ bighas. The sale-deed is within 12 years before suit, and therefore the defendant in that suit cannot claim to have acquired title by adverse possession. The learned Subordinate Judge however, relying on the evidence of the father of defendant 4, Ex. 121, held that the mortgage Ex. 126 dated 10th June 1865, for Rs. 4,000, was binding on the institution. The mortgage, Ex. 126, of 10th June 1865, in favour of Vallabh Lallu and Prag Khushal for Rs. 4,000 was satisfied on 28th May 1898, by borrowing money from Umedram Occhavram in whose favour the mortgage, Ex. 125, was passed by defendant 4's father on 28th May 1898, which remained unpaid till 2nd August 1918, when the sale-deed Ex. 124 was passed. It is very difficult to rely on the evidence of defendant 4's father in Ex. 121 when he stated that the money was borrowed by Ex. 126 for the purposes of the Masjid and the darga, when a similar statement of defendant 4's father with regard to the mortgages in respect of 397½ bighas was disbelieved by the lower Court. It is difficult to rely on the statement made by the same witness in respect of the mortgage, Ex. 126, when he is disbelieved in respect of the other mortgages, Exs. 128, 157, 156, 158, 160 and 161. If the evidence of defendant 4's father is true that the mortgage Ex. 126, was effected for a necessary purpose, the sale-deed of the defendant in suit No. 587 might be set aside as being within 12 years, but as the consideration money for the sale-deed went in liquidation of the mortgage, Ex. 125, which in its turn satisfied the mortgage, Ex. 126, the alienee would be entitled to recover the amount of Rs. 4,000. But I feel a difficulty in believing defendant 4's father on this point when the learned Judge disbelieved him with regard to the other mortgages. There is however another point on which the defendant in suit No. 587 is entitled to succeed. With regard to the 397½ bighas the several mortgages, Exs. 128, 157, 156, 158 and 160, were effected each within 12 years of the preceding one, and therefore none of the mortgagees had acquired a title by adverse possession. The mortgage, Ex. 161, dated 28th September 1916, was within 12 years before suit, and was merely a mortgage of the equity of redemption. The mortgage, Ex. 159 relating to 24¼ bighas is dated 17th March 1910, and is beyond 12 years of the institution of the suit. I have therefore held that it is binding on the institution. All the mortgagees with regard to the 397½ .bighas had not acquired adverse possession of the limited interest of a mortgagee. But the mortgage Ex. 126, in suit No. 587, relating to 33½ bighas was passed on 10th June 1865, and it was not paid off by defendant 4's father till 28th May 1898. The mortgagee was in possession for nearly 33 years, and even if Ex. 126 be considered to have been extinguished by the subsequent mortgage, Ex. 125, passed on 28th May 1898, the mortgagee Umedram Occhavram was in possession for nearly 20 years till 31st July 1918, when the sale deed, Ex. 124, in favour of the defendant in suit No. 587 was passed.

It is to be noted that after the mortgage, Ex. 125, was passed by defendant 4's father on 28th May 1898, defendant 4's father died in 1901 three years thereafter, and defendant 4 succeeded as a muttawali, and even taking the decision in *Vidya Varuthi's* case (5) to apply to an alienation other than a permanent lease, defendant 4 did not sue within 12 years after he came into power in 1901 as the muttawali to set aside the mortgage effected by his father. The mortgage therefore in my opinion, became binding on the religious institution either on the ground that 12 years had elapsed from the date of the alienation or from the death of the manager who effected the mortgage. The mortgage, Ex. 125, being binding on the institution, the sale-deed, Ex. 124, dated 31st July 1918, which was effected to pay off that mortgage, must be upheld

to the extent of the debt created by the mortgage, Ex. 125, which was for Rupees 4,500 and which had become binding on the institution by lapse of time. I think therefore that the plaintiffs cannot recover possession of 33½ bighas covered by the sale deed, Ex. 124, dated 31st July 1918, without paying off the amount of Rs. 4,500 due on the mortgage Ex. 125.

The result therefore is that in appeal No. 434 of 1926 in suit No. 588 of 1924 I would reverse the decree of the lower Court and allow the plaintiffs possession of 390 3/4 bighas out of 397½ bighas, and set aside mortgages Exs. 160 of 31st October 1912, and 161 of 28th September 1916; but with regard to the 24¼ bighas covered by the mortgage. Ex. 159, dated 17th March 1910, I would allow the plaintiffs to recover possession of the property on payment of Rs. 1,500, the amount due on the mortgage within six months from this date and in default the right of redemption will be for ever barred. Having regard to the difficult question arising in the case, I would order each party to bear his own costs throughout. In appeal No. 435 of 1926 in suit No. 587 of 1924 I would reverse the decree of the lower Court and allow the plaintiffs to recover possession of the 33½ bighas from the defendant purchaser under the sale-deed Ex. 124 on payment to him of Rs. 4,500 due on the mortgage, Ex. 125, dated 28th May 1898, within six months from this date, or in default the right of redemption will be for ever barred. Each party to bear his own costs throughout.

Murphy, J.—The suit was filed by the muttawali and trustees of a Mahomedan wakf, having been appointed by the District Court of Surat, to recover certain immovable property situated in the village of Mogar in the Surat District and alleged to have formed part of the original wakf and to have been improperly alienated by the late muttawali, or his son defendant 4, and now to be in possession of the other defendants. The only real issues are, whether, or not, the property claimed formed part of the wakf, and if it did, whether the suit is in time, or not, as regards any or all of the property.

The specific facts are the following:

The villages of Mogar and Nasirpur were alienated by the Mogul Emperor Alamgir in 1668 in favour of the family of two celebrated saints and have been held by the family ever since. A sanad was granted by the British Government in recognition of the grant in 1874 and this is one in personal inam, a form of tenure which allows of alienations by the owners. There is no sovereign grant of a wakf. and the one we are concerned with is a private dedication by the members of the alienees' family. There is no document but the dedication is said to have been prior to 1807, and is connected with the services of a mosque and two dargas at Navsari in Baroda State. The Baroda authorities first took action in the matter in 1910, and since then a muttawali has been appointed for the property of the foundation at Navsari, and also a committee to manage it. The British India suit, which ended in the deposition of the same muttawali, defendant 4, was filed in 1919 and finally decided by this Court in 1922. The mutawalli and committee are the same as the ones appointed by the Baroda State. This suit was filed on 29th September 1924 by that muttawalli and committee. The learned Subordinate Judge's important findings are (1) that the suit properties have been proved to be wakf; (2) that the suit alienations are not valid and binding on the plaintiffs but that the : suit is time barred. The suit was accordingly dismissed. Appellants' main point was the one they had failed on, that of limitation but Messrs. Thakor and Coyajee for the respondents supported the decree also on grounds which were found against them in the Court below. It is therefore necessary again to decide both the main points in the suit. There are to begin with certain difficulties in identification. The village has never been surveyed and there are no land records and there is no map based on any real measurements. The area given are approximate bighas. The description in the plaint is by approximate areas and boundaries and tenants' names and occasionally a field name. The descriptions in the mortgage and sale deeds are similar.

The earliest document is the Emperor's grant and is not of a wakf but one for maintenance and the Government sanad correspondingly one of a personal inam. The wakf if any was as it could be

created by the alienees. The earliest mention of it is in a document of 1807. This is executed by one Malek Abas son of Malek Ishak who acknowledges the receipt of "the khanka and wakf land of Mogar" and undertakes properly to expend its revenue. The next document in time is Ex. 101 of 1829. This is really a consent decree dividing the inam lands into three principal shares and allotting the liabilities of the family for its debts. Its importance in the case is that it mentions a large, though not further defined area as khanka a word not synonymous with wakf but implying a wakf of a special kind. It is really by a process of reasoning on the basis of this document that the identity of the land is made out. The third document is of 1833 and is also an agreement between the owners of the village. It again mentions the khanka. The fourth another agreement of 1853, when Hajimiya relinquished his share of the khanka land and the whole of its management was handed over to defendant 4's grandfather. Nanumiya, defendant 4's father appears to to have been the manager from 1865 till he died in 1901. In 1887 there was a suit against him in the Navsari Court, for accounts in which it was alleged that wakf property had been alienated and he was examined but in the eod the suit was withdrawn. It appears that Nanumiya and probably his predecessors before him as well as his successor after him had been treating the family wakf property as their own and had been encumbering it for their private debts. The proceedings of 1887 were however in Baroda as were those which began in 1910.

The importance of these proceedings of 1910 onwards in Baroda State has I think been unduly exaggerated in the present suit. The reason is that the foundation in the interests of which the land at Mogar was dedicated to wakf is at Navsari in that State and all there is in British India is the land the income of which should be spent on the mosque at Navsari. In these circumstances the muttawali or sajjadanashin was naturally single and managed in theory both the land in British India and the mosque and its property in Navsari. In reality he had so a dual office as muttawali of the land in British India to be managed in the interest of the foundation in Baroda and the duties of his office in Baroda. But when it comes to legal proceedings the Baroda writ does not except by a special procedure run in British India and vice versa and consequently the deposition of defendant 4 as muttawali in Baroda could not in law, as the learned Subordinate Judge seems to think, have a like effect on his office and duties in British India of which he was not deprived in the due course of law till the final decision of the suit of 1919 in 1922. On this point the learned Subordinate Judge seems to me to have missed the significance of another important fact. The Baroda proceedings were even in the first instance, only a qualified deposition. Defendant 4 was re-admitted as muttawali on entering into certain undertakings in 1915, and was in possession of the office for at least a year and was then again expelled. This incident also has a bearing on the question, though in my view not an important one for the Baroda proceedings admittedly excepted from their scope, as in fact they specifically state the land in British India and if this is so and it must be we cannot cssume that defendant 4 was dispossessed in 1910 in British India and that time began to run from that year in his and his alienees' favour till 1924 when suit was brought and that it is consequently timebarred.

The law of limitation in the case of a muttawali of a Mahomedan wakf has recently been altered by Act 1 of 1929, but these facts are of an earlier date. It had been held in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (5), the leading case on the point that a muttawali is not a trustee within the English meaning of that word but a manager with certain powers over the property belonging to the foundation and the general principle of limitation applied was that where such a manager grants a lease, either permanent or for a term of years, it is good for his lifetime end limitation begins to run from the date of his death, but that in the case of an unauthorized sale the starting point is the date of the sale, both under Art. 144, Limitation Act.

There are no leading cases directly bearing on the point of departure for limitation in such circumstances in the case of a mortgage; but since a mort-

gage with possession partakes more of the nature of a sale than of that of a lease, I think that it must for this purpose be treated in that category, where, as here, the mortgagor lost possession—in fact, possession was with permanent tenants—and that the date of departure for adverse possession would, as in the case of a sale, be the date of the mortgage. There were here a series of transactions and it is necessary to set them out. We are concerned with three parcels of land, and we have to deal with the transactions affecting the three parcels separately?

(1) The 397½ bighas were successively mortgaged in1892, 1900, 1905,1906 and 1912, ending with the mortgage of the equity of redemption in 1918. (2) The 33½ bighas were mortgaged in 1865 and 1898, and were sold in 1918. (3) The 24¼ bighas were mortgaged for Rs. 1,500 in 1901. The first point to decide is whether the possession of successive mortgagees is a continuation of adverse possession, or whether it ceases on the mortgage being redeemed, even though the purposes of the fresh mortgage is to pay off a former one as was the case here with respect to the 397½ and 33½ bighas. I think that there must be a rest at the points where one mortgage is paid off and a second is executed, during which possession must be deemed to have been with the owner, or here the manager of the wakf, and that a succeeding mortgagee and in the end, a final one, cannot tack his own possession to that of his predecessors, for each mortgage incurred and paid off is a transaction by itself. If I am right in so thinking, we have to consider the three cases before us on these lines. The mortgage of 1910 is not within 12 years of the suit and cannot therefore be set aside, so that if the wakf is to recover the 24¼ bighas, it must be redeemed by a payment of Rs. 1,500. The series of mortgages of 397½ bighas, beginning with the one in 1892 and ending with the one of 1912 (Ex. 160), are all within 12 years of each other, and the last one is within 12 years of the suit, it having been executed on 31st October 1912, and the suit having been brought on 27th September 1924.

It has been found that these mortgages were not for a necessary purpose, and I agree with this conclusion. In these circumstances this mortgage, and its successor, mortgaging the equity of redemption, are not binding on the wakf and may be set aside. The last parcel of 33½ bighas was mortgaged in 1865 and again in 1898, and was sold in 1918. The sale is within 12 years of the suit and can be set aside. The first mortgage of 1865 was satisfied on the execution of the second one in 1898 in favour of Umedram Occhavram, but that person remained in possession for 20 years: his predecessor having been in possession for 33 years. The learned Subordinate Judge thought that the mortgage of 1898 was made for a necessary purpose, but there is only the word of the defendant's father, who was obviously interested to this effect. He died in 1901. Even if we reject the finding as to its object, adverse possession on the premises we have adopted ran against the wakf from 1901 at least—and the amount due on it was Rs. 4,500. The learned counsel for the respondents have supported the lower Court's decree on all possible grounds and it is necessary that I should say a few words on some of these other grounds. One of the arguments used was that no wakf of this land had been made out. It is true that the dedication to wakf must have been private and that there is no document of grant; but the fact has been referred to so often, over so long a series of years, that I think it must be accepted, as it was by this Court in the suit brought by the plaintiff and others in 1919; for it is very improbable that the facts would have been as we find them had the wakf not been recognized in the family—even though through the same long series of years, the successive muttawalis treated it as if the dedicated property was their own. In plaintiffs' words, they were all men who, like himself,

"are unreliable and needy. I am also like them, i. e., all of us would swallow charitable property."

Yet another argument has been that in any case by a local custom long since recognized in *Abas Alli* v. *Ghulam Mahammad* (1) and *Krishnarao Gunesh* v. *Rangrav* (2), wakf land in the Broach and Surat Districts may be mortgaged by the mutawalli, in spite of the contrary directions of the Mahomedan law. But the custom was never pleaded in this

case and there is no evidence of it; while the cases relied on are old ones. There is no recent support of Mr. Coyajee's contention, and I think that in the circumstances we cannot be guided by these rulings. Again it was argued that under the Mahomedan law the Kazi has authority to sanction alienations of wakf property and that two of the relevant documents have been attested by a person who describes himself as a Kazi. But we do not know whether he signed as a Kazi, and in any case a mere attestation is, I think, something different from a formal sanction of an alienation for proper reasons, and of such a sanction there is no evidence.

To sum up: I think that the land in question has been shown to have been part of a private family wakf, and that plaintiff and his committee, as the result of the suit of 1919 under S. 92, Civil P. C., are entitled to sue to recover it for its dedicated object; that the proceedings in Baroda territory cannot be considered to have had any effect, as an origin for limitation, so as to affect this land in British India; that the proper article of the Indian Limitation Act to apply is Art 144; that where there are a series of mortgage transactions, each mortgage being redeemed on its successors' execution, time begins to run from the date of execution of each successive mortgage: and that such alienations not being for a necessary purpose may be set aside, provided that adverse possession has not existed for more than 12 years before suit. Applying these findings to the facts we are considering, I conclude that the mortgage of 1910 cannot be set aside and must be redeemed: that that of 1898 ending in the sale of 1918 is in similar case; but that no adverse possession has been made out in the instance of the remaining parcel of land, and that those encumbrances may be set aside. I agree therefore with the order proposed by my learned brother in his judgment just delivered.

K.S. *Order accordingly.*

A. I. R. 1933 Bombay 229

BEAUMONT, C. J. AND MURPHY, J.

W. M. Rittoms—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 460 of 1932, Decided on 6th February 1933, against order of Honorary Presidency Magistrate, Bombay.

Bombay Motor Vehicles Rules (1915), R. 19 (1)—R. 19 (1). covers tramcar which is stationary—"Ordinarily" meaning explained.

Although R. 19 (1) refers to tramcar whether it be going in the same or in the contrary direction the rule covers a tramcar which is stationary. The adverb "ordinarily" denotes that the rule applies except in a case in which there is some impediment to passing the tramcar on the near side; for example the road may be up or there may be a long line of slow moving traffic which would make it impossible to pass the tramcar on the near side within a reasonable time.

The mere fact that there are foot passengers which made it difficult for accused to pass a tramcar on the near side and that there is plenty of room to pass it on the right side is not enough to take the case out of the rule.

[P 229 C 2; P 230 C 1]

H. V. Divatia—for Accused.

B. G. Rao—for the Crown.

Beaumont, C. J.—In this case the accused applies in revision and asks us to interfere with his conviction under R. 19 (1), Bombay Motor Vehicles Rules, 1915. That rule provides:

> "A motor vehicle shall be driven in accordance with the rules of the road which require a vehicle to keep on the left except when passing horses and other vehicles going in the same direction which should be passed on the right and provided that it should ordinarily pass a tramcar on the left or near side whether it be going in the same or contrary direction."

In the present case a tramcar normally proceeding in the same direction as the car which the accused was driving was temporarily stationary and people were either getting in or alighting and therefore made it difficult for the accused to pass the car on the near side. Although the rule refers to a tramcar whether it be going in the same or in the contrary direction, I think those latter words are not exhaustive and that the rule covers a tramcar which is stationary. The question really is what is the meaning of "ordinarily." The accused here says that there were foot-passengers which made it difficult for him to pass the tramcar on the near side and that there was plenty of room for him to pass it on the right hand side. But I do not think that that is enough to take the

case out of the rule. I think the adverb "ordinarily" denotes that the rule applies except in a case in which there is some impediment to passing the tramcar on the near side; for example the road may be up or there may be a long line of slow moving traffic which would make it impossible to pass the tramcar on the near side within a reasonable time. In the present case the accused had only to slow down, or possibly to stop for a moment or two, in order to avoid running over the people approaching the tramcar. There is no charge against him of negligent driving. The only question is whether he has broken the terms of this rule. It is not I think enough for him to say there was no oncoming traffic which would prevent him passing the tramcar on the right hand side. People who know of this rule may walk in front of a stationary tramcar in order to cross the road on the assumption that no traffic will be passing the tramcar on the right hand side, and if this rule is ignored, people in that condition may easily be run over. In the circumstances I think there is no ground on which we can interfere with the conviction by the Honorary Presidency Magistrate, Mazagaon. The application is dismissed.

K.S. *Application dismissed.*

A. I. R. 1933 Bombay 230

MURPHY AND BROOMFIELD, JJ.

Krishna Babaji Chavan—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 637 of 1932, Decided on 13th January 1933, against decision of Sess. Judge, Satara.

Criminal Trial — Retracted confession—Value of, explained—Criminal P. C., S. 164.

A retracted confession must always be most carefully scrutinised and the Court should be cautious about relying upon it. It is not cancelled out, but the Court is put on inquiry as to its value, its voluntary character and the probability of its being true. As a general rule a retracted confession requires corroboration of some kind, although as a matter of law corroboration is not necessary at all. But the amount of corroboration which the Court will look for depends on the circumstances of the particular case, and sometimes very slight corroboration will suffice: *A I R* 1932 *Bom* 553, *Ref*; *A I R* 1929 *Bom* 327, *Rel on.* [P 231 C 2]

A. A. Adarkar—for Accused.

P. B. Shingne—for the Crown.

Broomfield, J.—The accused has been convicted of the murder of his wife Mukta and sentenced to transportation for life. Mukta, who appears to have been a woman of very bad character and was reputed to have several lovers, lived with her husband, the accused, at Soni, a village in the Tasgaon taluka. Early on the morning of 4th June 1932, she was found lying dead in the angan of her house with her skull fractured. There was a heavy stone weighing thirty-eight seers lying close to the body. It was obviously a case of murder. A witness Vithu Jayaji, Ex. 10, has deposed that as he was passing by the accused's house early in the morning on his way to his field he heard cries in the compound and the accused came out of his house and said:

"I was sleeping inside and she was sleeping outside; some one has murdered her; go and inform the Police patel."

The witness says that at that time he saw a heavy stone lying near the carpse. He went and gave the information to the patel, who reported the matter to the police. The Sub-Inspector arrived on the night of 4th June and after making inquiries from the accused's relations and other persons on the 5th he arrested the accused on the 6th. On the 7th he sent the accused to the Magistrate at Tasgaon in order that his confession might be recorded. The accused made a confession which was recorded on the 9th. It will be better to give this confession in full since it is the main foundation of the prosecution case against the accused. After the preliminary examination the accused stated as follows:

"There was a quarrel between me and my wife. My wife was of very bad conduct. I and my wife were living separate in my house. I always came to hear complaints about her bad conduct. I felt much dejected. I thought I should give up this worldly life and go somewhere. Some would say that she had been in illicit intercourse with a Mang, others would say that she had been in illicit intercourse with a Maratha. In these circumstances I thought I should not show my face to any body and should go somewhere. At my village there was a marriage ceremony in the house of my relation seven or eight days ago. People would look at me and laugh. I would be ashamed. The marriage ceremony was over. The people went back to their villages. On Friday night there was a fair in the Maharwada. I had been to the garden land in the Gavadan field. I sat at the well and thought over. I was tired of my life. At 11 p. m. I returned from the garden land. I sat on a log of wood that was in front of my house. After a short while I went into the house. My wife was not in the house. She came back after an hour. I questioned her as to where she had

been. She said nothing. She slept outside in the court-yard. I became desperate. I started in order that I should go somewhere. I stood near the heap of stones. I picked up a very large stone there with both hands, brought it and threw it standing near by on the head of my wife who had slept. Her head was broken. Blood oozed out. She made no movement at all nor did she raise a cry. She died instantaneously. I went into the house and slept. There was a row outside forthwith. I opened the door and came out and sat there. A number of people had gathered. The patel and the Talathi came on Saturday morning and made a Panchnama. The police came."

On 20th July in the Court of the committing Magistrate the accused retracted his confession and stated that he had made it through fear of the Fauzdar Saheb. At that time he gave no details and did not explain why he was afraid or what had happened to him. When he was examined at the trial by the Sessions'Judge he alleged that the Sub-Inspector had told him that unless he confessed he would disgrace and ill-treat his sister. He also alleged that at the time when he made his confession there were three policemen in the Court who were threatening to torture him.

Mr. Adarkar who appears for the appellant in this case has relied upon certain remarks of Wadia, J., in *Emperor* v. *Housabai* (1) and contends that, as the accused's confession has been retracted it should not be acted upon without independent corroboration in material particulars. Now it is obvious that the retractation of a confession is a circumstance of very varying importance. Its significance depends on the nature of the confession, the circumstances in which it was made, the circumstances in which the retractation was made and the nature of the retractation. If a full and detailed confession is made in circumstances which make it unlikely that it was the result of coercion or inducement the fact that it is subsequently retracted may mean little or nothing: for the making of the confession can hardly be explained except on the hypothesis that it is true, whereas the retractation may easily be explained as an act of policy, the result of legal advice or the pressure of friends or the suggession of more sophisticated associates in the lock-up. If a confession is retracted at the earliest opportunity more weight may fairly be attached to it than if the accused waits until the Sessions trial; and a retractation which takes the form of a mere denial of the fact of making the confession can hardly ever be given the same importance as one which admits the making of the confession but explains it as due to coercion or illegal inducement. If there is anything in the evidence which lends support to a suggestion of the latter kind, the confession must always be most carefully scrutinised and the Court should be cautious about relying upon it. That I take to be the real effect of the retractation of a confession. It does not cancel out the confession, but it puts the Court on inquiry as to its value, its voluntary character and the probability of its being true. And that is why it has been laid down frequently by the Courts that as a general rule a retracted confession requires corroboration of some kind, although as a matter of law corroboration is not necessary at all as was pointed out by this Court in *Emperor* v. *Rama Kariyappa* (2). But the amount of corroboration which the Court will look for depends on the circumstances of the particular case, and sometimes very slight corroboration will suffice.

In this present case the accused retracted his confession at the earliest opportunity, that is to say, when the case came before the committing Magistrate, and he has made allegations of illegal inducement of the confession on the part of the police. But there is no evidence here which would justify one in attaching any importance to these allegations. It appears that every possible precaution was taken by the Magistrate who recorded the confession. The accused reached him on 8th June. His confession was not recorded until the 9th. So that he had time to think the matter over. In the certificate which the Magistrate has appended to the confession he says:

"I explained to Krishna Babaji that he is not bound to make the confession, and if he does so, any confession he may make may be used as evidence against him. This was explained to him yesterday when he was brought before me and even before recording the confession to-day. He was given sufficient time for reflection and I believe from the manner in which he gave the statement that the confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct and it contains a

1. A I R 1932 Bom 553=140 I C 740=56 Bom 542=34 Cr L J 73.

2. A I R 1929 Bom 327=120 I C 350.

full and true account of the statement made by him."

The questions prescribed by the High Court were duly put and the accused stated that he had come to make a statement of his own free will, that he had not been threatened or induced by any one to make the confession, that he was aware that he was not bound to make a confession, and that, if he did, it would be used against him, and that knowing this and having fully thought over the matter he was nevertheless prepared to make a confession. If the accused had been treated as he subsequently alleged he had been, there is no reason that I can see why he should not have told the Magistrate about it. Moreover as the Judge has suggested in the course of his judgment, in a case of this kind, having regard to the bad character of Mukta, everybody's sympathies would have been with the accused, and it is difficult to believe therefore that the police would go out of their way to put pressure upon him to make him confess. The accused was arrested on 6th June and he was no doubt in the custody and power of the police till he was sent to the Magistrate on the 7th and indeed until he reached the Magistrate's Court on the 8th. But that was inevitable under the circumstances. Soni is at a considerable distance from the Magistrate's Court and this fact therefore does not justify any inference against the police. The Sub-Inspector was a witness, and, although he was cross-examined in considerable detail on some points, no questions were put to him with regard to the allegations made by the accused. As I have mentioned already, in the committing Magistrate's Court the allegations were quite vague, and at least one of the allegations made by the accused in the Sessions Court is plainly absurd. It is impossible to believe that the Magistrate would allow three policemen to stand in Court and threaten the accused while his statement was being recorded. Under these circumstances, having regard to the remarks which I made at the beginning, it is not a case in which very much need be looked for in the way of corroboration of the confession.

There is however corroboration of the confession. We do not consider that much importance can be attached to the corroboration on points of detail mentioned by the learned Judge in his judgment, viz., the fact that the stone found lying near the corpse was similar to those in the heap of stones referred to by the accused in his confession, and the fact that there is a witness Mira Mang, Ex. 13, who deposes to having seen the accused sitting upon a log. But there is corroboration of another kind. The accused and his wife were the only people living in that house. Mira Mang's evidence, Ex. 13, is important in this respect that it shows that the accused was sitting about apparently waiting for his wife fairly late on the evening before she met with her death. There is a witness Yeshwant Tukaram, Ex. 22, who deposes that he saw Mukta going home about 10 p. m. on that same evening. Although it appears that Mukta used to sleep in the angan and the accused slept inside a room, it seems hardly likely that Mukta could have been killed without the accused knowing who did it and how it happened. In any case if the accused did not do it himself, it is difficult to see what possible motive he could have had for taking the blame of the crime upon himself and thereby letting off the real culprit. Mr. Adarkar suggested that he was fond of his wife and when she was dead he lost heart and confessed to having committed the crime and so indirectly committed suicide. This suggestion however does not appeal to us. It is to be remembered further that the accused had an obvious motive for killing his wife in the sense that she was a bad woman whose conduct has brought him into disgrace and ridicule. If his confession is true,—and we believe it is—then he had further provocation on that very night, for he says that when he asked her where she had been so late at night she gave no answer of any kind. It is quite easy to understand that her conduct may have so worked upon his feelings as to drive him to kill her.

On the other hand it does not appear that any one else had any motive for killing her. There is no doubt the evidence of the accused's sister Abai, who has deposed about a quarrel between the deceased and one Shripati Mang, and has also stated that the accused and Mukta were on good terms and that on the night when Mukta was killed the

accused was shut up in a room which was chained from outside, so that he could not have possibly committed the murder. What Abai says about Shripati Mang is this. She heard Mukta say to the Mang

"You do not do your work properly. You speak bad language and I will tell my husband."

From the language used, Abai explains, she thought that they were on terms of criminal intimacy. Mukta then said "I will tell my husband." He said "Why do you require your husband, I will show you." This is the main foundation for a suggestion made on behalf of the defence that Mukta had really been killed by Shripati Mang, though why Shripati Mang, if he was Mukta's lover should wish to kill her is not explained. As the Judge points out there is nothing in the words deposed to by Abai, even if her evidence is true, which would be calculated to provoke Shripati to murder his mistress. As to Abai's statement that the accused and Mukta were on good terms she has also admitted that they frequently quarrelled and that the accused was always dejected. Her statement that the accused was shut up in the room is contradicted by the evidence of Vithu Jayaji and cannot be true. The trial Judge says that Abai's demeanour was very unsatisfactory, that she was apparently prepared to give any answer that was suggested by leading questions and that her evidence was quite unworthy of belief. We see no reason to differ from the learned Judge's opinion of this witness. It seems therefore that the accused's confession is in accordance with all the probabilities of the case. It explains the killing of Mukta in a perfectly natural way, and as far as we can see there is no other reasonable explanation of it. Under these circumstances we hold that the accused's confession ought to be accepted and acted upon in spite of the fact that it was retracted. We confirm the conviction and sentence, and dismiss the appeal.

R.K. *Sentence confirmed.*

A. I. R. 1933 Bombay 233

BEAUMONT, C. J. AND MURPHY, J.

Dahyabhai Nathabhai—Complainant.

v.

Tanganio Machhi—Accused.

Criminal Ref. No. 2 of 1933, Decided on 14th February 1933, made by Sessions Judge, Surat.

Criminal P. C. (1898), S. 250—Criminal proceedings brought not bona fide but to bring pressure on opponent in civil suit—Complainant can be proceeded under S. 250.

Where perfectly plain case of criminal proceedings are started, not really bona fide, but with a view to bring pressure to bear against an opponent in a civil dispute, the Magistrate is abundantly justified in proceedings against the complainant under S. 250, Criminal P. C. [P 234 C 1]

B. G. Rao—for the Crown.

Beaumont, C. J.—This is a reference by the Sessions Judge of Surat under S. 438, Criminal P. C., in which he asks us to set aside an order made by the First Class Magistrate of Mandvi by which he ordered the complainant to pay compensation of Rs. 30 and in default to suffer simple imprisonment for 15 days under S. 250, Criminal P. C. He recommends that we should set that order aside. The complaint in question was for offences under S. 447, I. P. C., that is to say, charging the two accused with criminal trespass. According to the learned Magistrate's judgment the case came on for hearing on 20th July 1932, when the complainant's examination-in-chief was completed and the cross-examination was reserved. There were then various adjournments, and ultimately, on 26th August, the complainant made an application stating that the matter had been entrusted for arbitration and asking for a long adjournment with a view to the case being compounded at the end of the arbitration. The learned Magistrate refused that application and acquitted the accused. He came to the conclusion that in view of the evidence of the complainant, which showed that accused 1 had been in possession of the land in question for several years, and in view of the application to refer the matter to arbitration, it was clear that the dispute between the parties was really of a civil nature and that there was no justification whatever for making a charge of criminal trespass against the accused. Accordingly he

called upon the complainant, under S. 250, Criminal P. C., to show cause why he should not be made to pay compensation to the accused for his false and vexatious complaint, and he then inflicted the sentence on the complainant which I have referred to.

The learned Sessions Judge in his letter of reference says that the view of the learned Magistrate that the case was of a civil nature and that the complainant should not have come to the criminal Court is no justification for the conclusion that the complaint was false and vexatious. I entirely disagree with that view of the learned Sessions Judge. Experience in this Court shows that there is a great deal of abuse in this country of the criminal law. People with civil disputes, in my experience, frequently attempt to harass their opponents, or force them to compromise, by starting criminal proceedings. When there is a dispute as to boundaries, one party charges the other with criminal trespass ; when there is dispute between partners, one party charges the other with criminal misappropriation or breach of trust. Of course it may well be in some cases that civil and criminal proceedings arising out of the same matter may be prosecuted simultaneously, and it may sometimes happen that civil proceedings are started with a view to stifle criminal proceedings. But where you have a perfectly plain case of criminal proceedings started, not really bona fide, but with a view to bring pressure to bear against an opponent in a civil dispute, I think that the Magistrate is abundantly justified in proceeding against the complainant under S. 250, Criminal P. C. In this case I see no reason whatever to doubt that the view which the learned Magistrate took was correct. The accused having been in possession for several years, it is inconceivable that the complainant could have established a case of criminal trespass, and the fact that he was willing to refer the dispute to arbitration shows, as the learned Magistrate says, that the case was of a civil nature. That being so, I think the course which the learned Magistrate adopted was correct, and that this reference should be refused.

Murphy, J.—I agree.

K.S. *Reference answered.*

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* A. I. R. 1933 Bombay 234

MURPHY AND BROOMFIELD, JJ.

Emperor

v.

Gopal Shinde Patel—Accused.

Criminal Ref. No. 109 of 1932, Decided on 18th January 1933, from decision of Sess. Judge, Karwar.

* **(a) Criminal P. C. (as amended in 1923), S. 495 (4)—Excise officer.**

"Excise officers" are not included in the expression "officer of police" in S. 495 (4): *Case law considered.* [P 236 C 2]

(b) Interpretation of Statutes—Scope.

A Government resolution cannot override the law. [P 237 C 1]

P. B. Shingne—for the Crown.

Murphy, J.—This matter arises out of a reference which has been made by the learned Sessions Judge of Kanara on the following facts:

Two persons were being prosecuted in the Court of the City Magistrate, Karwar under S. 45 (c), Bombay Abkari Act. At the commencement of the case, the prosecution was undertaken by the Abkari Inspector, and the accused objecting to this procedure the learned Magistrate made an order against them and directed that the prosecution should proceed as already started. One of the accused applied to the learned Sessions Judge under S. 435, Criminal P. C., and the Judge has referred the matter to this Court, his opinion being that under S. 495 (4), Criminal P. C., the Abkari Inspector is not competent to conduct the prosecution, as he comes within the connotation of the expression "an officer of police" in that subsection. There is no direct authority for the view adopted by the learned Sessions Judge, the reference having been made on the grounds of the analogy of the expression used in S. 495, with that used in S. 25, Evidence Act, which excludes confessions made to a police officer, and a ruling of this Court in *Nanoo* v. *Emperor* (1), in which a Full Bench consisting of five Judges held that a confession made to an excise officer, who under the Abkari Act exercises all the powers of a Sub-Inspector of Police in charge of a police station in excise cases is an officer of police within the meaning of S. 25, Evidence Act. There is no definition of the expression "an officer of police" that we have been referred to, nor have we been able to find any.

1. A I R 1927 Bom 4=99 I C 330=51 Bom 78=28 Bom L R 1196 (FB).

It does not appear to have been defined in the General Clauses Act, but in the Police Act, Act 5 of 1861, the definition is that the word "police" shall include all persons who shall be enrolled under that Act, and in the Bombay District Police Act, Act 4 of 1890, the definition is, "police officer" means any member of a police force appointed under that Act; and in the Bombay City Police Act, Act 4 of 1902, the definition is, "any member of the police force for the City of Bombay appointed under that Act." It is clear that an Abkari Inspector does not come within any of these definitions. There has been a considerable conflict of decisions on the point as it arises under S. 25, Evidence Act. The original view held by the Calcutta High Court was that an excise officer was not a police officer within the meaning of S. 25, Evidence Act. Next came the Bombay decision, which decided the point in the contrary sense, since when one Bench of the Calcutta High Court in *Ibrahim Ahmad* v. *Emperor* (2) followed the Bombay ruling holding that the term "police officer" should be read, not in any strict sense, but according to a more comprehensive one, and that on principle also the position of a police officer could not be distinguished from that of an excise officer with regard to an offence under the Excise Act, because an excise officer is also interested in the conviction of the accused and in a position to dominate him.

In a later case, which is not officially reported, but is to be found in *Matilall Kalwar* v. *Emperor*, *A. I. R.* 1932 *Cal.* 122, another Bench decided that an Excise Sub-Inspector was not a police officer within the meaning of S. 25, Evidence Act. The latest decision is one of the Patna High Court in *Radha Kishun* v. *Emperor* (3), and the finding of the special Bench of that Court was that an excise officer under the Bihar and Orissa Excise Act is not a "police officer" within the meaning of S. 25, Evidence Act, and therefore that a confession made to an Excise Inspector who, under the Dangerous Drugs Act (2 of 1930), not only has the power to arrest and search, but has also been invested by the Local Government with the powers of an officer in charge of a police station for the investigation of an offence under that particular Act is admissible in evidence. The learned Chief Justice, who delivered the principal judgment in that case, discussed the Bombay ruling and said that, with great respect, he was in complete disagreement with the arguments which found favour in that case, thinking that there were two fundamental fallacies underlying the conclusion: one was that the learned Judges had misunderstood the Calcutta decision in *Queen* v. *Hurribole Chunder Ghose* (4), and the second, that an erroneous canon of construction of statutes had been applied. In his view Courts of justice are not concerned with the objects with which the legislature enacts any particular law, unless in the particular enactment, the object is stated as a guiding principle to be followed in interpretation. All these rulings are as to the proper interpretation of S. 25, Evidence Act, and not of the section in the Criminal Procedure Code with which we are now concerned. The only case directly on that section, we have been able to find, is an unreported decision of this Court in *Imperator* v. *Charles Stanley Wilson* (5), the judgments in which were delivered by the late Shah and Hayward, JJ. In that case Shah, J., remarked:

"The other point raised in this appeal is that the investigating Excise Officer was allowed to conduct the prosecution contrary to the provisions of sub-S. 4, S. 495. Assuming, without deciding, that the investigating officer who was allowed to conduct the prosecution was an officer of police within the meaning of sub-S. 4, I do not think that the irregularity can affect the result in this case. As pointed out in *Emperor* v. *Tribhovandas* (6) such an irregularity would be covered by the provisions of S. 537, Criminal P. C., and in the absence of an indication of any prejudice to the accused or failure of justice resulting from such an irregularity we cannot reverse the finding or interfere with the order of the lower Court in appeal. I think however that there is force in the contention that the trial Magistrate should not have permitted the investigating officer to conduct the prosecution in this case for the reasons underlying the provisions of S. 495, sub-S. (4). If an officer who may not be an officer of police, but who has to do duty similar to that of a police officer with reference to the investigation of an offence under the Opium Act, has taken part in such investi-

2. A I R 1931 Cal 350=1931 Cr C 414=131 I C 113=32 Cr L J 640=58 Cal 1260.
3. A I R 1932 Pat 293=1932 Cr C 765=140 I C 283=34 Cr L J 1=12 Pat 46.
4. (1876) 1 Cal 207=25 W R 86.
5. Criminal Appeal No. 418 of 1919, dated 6th August 1919, by Shah and Hayward, JJ.
6. (1902) 26 Bom 533=4 Bom L R 271.

gation, it would be desirable not to permit him to conduct the prosecution, particularly if he is likely to be a witness in the case. That however is a matter for the trial Magistrate to take into consideration at the time of exercising his discretion under S. 495, sub-S. (1), and granting the necessary permission."

The relevant portion of Hayward, J.'s judgment on the point is as follows :

"It is not necessary to have recourse to the statements hardly amounting to confessions which have been alleged to have been made by the accused to the Excise Officers. It is not necessary therefore to consider whether Excise Officers should or should not be classed as police officers for the purposes of S. 25, Evidence Act. It is again unnecessary to decide whether Excise Officers could be included under the specific term 'police officer' as used in S. 495, Criminal P. C. Excise Officers are certainly not so included in a great number of other sections in the Code and it would require very clear indication to justifiy the conclusion that there was a different intention in respect of them in the use of the words 'police officer' in S. 495 of the Code. But in any case the conduct of the prosecution by the Excise Officer, though possibly indiscreetly permitted, would not appear to have resulted in material prejudice and therefore it would be at most an irregularity cured by S. 537, Criminal P. C."

It will be noticed that the learned Judges did not specifically decide the point, which was not directly in issue before them, for the decision turned on the merits of that case, though they seem to have been inclined to the opinion that, as a rule, the conduct of the prosecution by an investigating abkari officer should not have been allowed. We think however it was a matter for the exercise of the Magistrate's discretion, and this discretion, we find, is no longer there, for, by a Notification No. 6,601 of 13th December 1932, excise officers not lower in rank than Sub-Inspectors have been authorized to conduct prosecutions in such cases in this Presidency by Government. This is all the help that we have been able to derive from authority on the point. It will be noticed that all but one of these cases do not interpret S. 495. The learned Judge's argument is generally that the reasoning which is applicable to the cases under S. 25, Evidence Act, in support of the view taken by the Full Bench of this High Court as to the meaning of the expression "officer of police" in that section, applies with exactly similar force to the same expression as used in S. 495, Criminal P. C. We think however that the cases are not really as analogous as they appear to be at first sight. The prohibitions under S. 25, Evidence Act, and S. 495 (4), Criminal P. C., cannot really have been enacted on exactly similar grounds. One concerns a matter of evidence; the other, one of procedure. The first excludes a certain kind of evidence on the general principle underlying all rules of exclusion that such evidence is too dangerous to use.

If one may speculate, the second is based on a fear that an investigating officer may prove to be unfair prosecutor. The former is a weightier reason for exclusion than the latter, and the analogy between a confession made to a police officer and one made to an excise officer is far closer than in the case of prosecutors. There is therefore a far more compelling reason for including excise officers, though not expressly mentioned, in the expression "officer of police" as used in S. 25, Evidence Act, then there is for adopting the same interpretation in the case of S. 495 (4), Criminal P. C. Moreover, the Criminal Procedure Code was extensively amended in 1923 at a time when the powers of investigation exercised by excise officers were in full force, these having been conferred by an amendment of the Abkari Act in 1912, and it is not reasonable to presume that the fact that these officers were exercising these powers of investigation could have escaped the notice of the authorities responsible for the amendment of the Code, and that there would not have been a consequential amendment to that effect in S. 495, i. e., the words necessary to include them, such as "or other officers exercising similar powers," had the prohibition been intended to apply to such officers also. On the whole therefore I am of opinion that "excise officers" are not impliedly as they are not expressly included in the expression "officer of police" in S. 495 (4), Criminal P. C., and that the papers should be returned to the Sessions Judge with our opinion to this effect. The Magistrate's order will therefore stand.

Broomfield, J.—The question in this reference is whether an Inspector in the Excise Department is a police officer within the meaning of S. 495 (4), Criminal P. C. As pointed out by my learned brother, there has been a recent resolution of Government, dated 13th December 1932, by which Government, in exercise of the powers conferred

by S. 495 (1), has empowered excise officers of a certain standing to conduct prosecutions. This resolution was issued after the orders of the Magistrate and the Sessions Judge in the present case, but it is a matter which we have to take into consideration. A Government resolution cannot, of course, override the law, and if excise officers are to be regarded as police officers, they are debarred from conducting the prosecution in cases which they have themselves investigated. On the other hand, if they are not police officers within the meaning of Cl. (4), S. 495, they can, by virtue of the Government resolution, conduct the prosecution in any case and the Court would not have the power to prevent them doing so on the ground that they had investigated the case.

Apart from authority the matter seems to me to be fairly simple. There is no definition of a "Police Officer" in the Criminal Procedure Code, but prima facie a Police Officer should mean a member of a police force, a person enrolled or appointed for police duty, and not a member of some service or department appointed primarily for other duties altogether, but exercising powers similar to those of Police Officers for certain purposes connected with their duties. Excise Officers since 1912 have been given certain powers of investigation which are almost identical with those given to Police Officers under the Criminal Procedure Code. But that does not convert them into Police Officers.

The only authority directly in point is an unreported case of this High Court in *Imperator* v. *Charles Stanley Wilson* (5), decided by Shah and Hayward, JJ. The point was not really decided there, but Hayward, J., seems to have been rather inclined to the view that an Excise Officer is not a Police Officer according to the strict construction of S. 495 (4). The material parts of the judgment in this case have been cited by my learned brother, who has also pointed out that in view of the Government resolution there is no longer any question of policy to be considered. It is not now a matter for the discretion of the Magistrate and it is necessary to decide the question of law whether an Excise Officer is or is not a Police Officer within the meaning of S. 495 (4).

The real difficulty is caused by the Full Bench decision in *Emperor* v. *Nanno* (1). The actual point decided in that case was different. The Court had there to consider whether the term "Police Officer" in S. 25, Evidence Act, includes an Excise Officer, and it was held that it does. It would not necessarily follow that an Excise Officer is a Police Officer for the purpose of S. 495 (4), Criminal P. C. But if, as the learned Sessions Judge thinks, the reasoning on which the Full Bench decision was based applies with equal force in the case of S. 495 (4), it would be difficult for us to say that we are not prepared to follow it. The Full Bench decision is, of course, binding upon us so far as it goes, whatever view may be taken of it by other High Courts. Part of the ratio decidendi in *Emperor* v. *Nanno* (1) does undoubtedly apply here. Marten, C. J., says (p. 1206 of 28 *Bom. L. R.*) :

"Now, what was the object of S. 25, Evidence Act? It was, I take it, to prevent the abuse of their powers by the police in this country in extorting confessions from persons in their custody; and I take it that one of the most important periods, during which the accused persons were intended to be protected by the legislature, was when the case was being investigated by the Police Officers and when the accused were perhaps solely in police custody and not allowed to see any other person. Therefore so far as the spirit of the Act is concerned, we have the same possibilities of evil when an Excise Officer investigates a case, as we should have in the case of an investigation by Police Officers in charge of a police station under the Criminal Procedure Code."

Similarly Shah, J., observes (p. 1211 of 28 *Bom. L. R.*) :

"In taking this view of S. 25, it is essential and quite proper to bear in mind the purpose of the section. That purpose has been already stated. It has been discussed in *Empress* v. *Babu Lal* (7). In the words of Oldfield, J. (p. 513), 'The broad ground for not admitting confessions made to a Police Officer is to avoid the danger of admitting false confessions.' That ground would apply as much to an Excise Officer exercising the powers conferred upon him by S. 41, Abkari Act as amended as to a Police Officer."

If it is open to us to speculate as to the spirit and object of the Act, and as to the reason for the enactment of this provision (namely, S. 495 (4), Criminal P. C.), it must presumably have been that it was thought undesirable that a person responsible for the investigation of a case, and therefore in a sense interested in the result, should be allowed to conduct it in person. That has obvi-

7. (1884) 6 All 509=(1884) A W N 229 (FB).

ously nothing to do with the designation an officer may bear. The learned Government Pleader, who has appeared to oppose this reference, also suggested that another reason may have been that it is frequently necessary and desirable to call investigating officers as witnesses. But that of course will be equally so whether the investigating officer is a Police Officer or an Excise Officer exercising police powers. That particular point was taken before the First Class Magistrate who was dealing with this case and he pointed out that there was nothing to prevent the Excise Inspector giving evidence, although he was proposing to conduct the case. So far then, I think, the reasoning in the Full Bench case may be said to apply here. But this was not the sole basis of the decision. It seems to me that the Court was obviously influenced by other considerations which do not apply in the present case at all. Thus Fawcett, J., after referring to the leading case: *Queen* v. *Hurribole Chunder Ghose* (4), observes as follows (p. 1211 of 28 *Bom. L. R.*):

"The view . . . . that the term "Police Officer" in S. 25, Evidence Act, should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, is one which was arrived at only four years after the Evidence Act was enacted. That construction has been followed by this Court, as well as other High Courts; and, if the legislature had considered that that was a wrong construction to put upon the term "Police Officer" in S. 25, Evidence Act, the probability is that the section would have been amended so as to overrule such a construction. Therefore when the learned Advocate-General contends that S. 25, Evidence Act, does not cover a Revenue Officer, or any other officer on whom by statute certain powers of the police are conferred, and that to say it does cover such an officer is to read the section as if it said 'including officers who can reasonably be regarded as Police Officers,' then the answer is that we are merely acting on a construction adopted by the Courts long ago and tacitly accepted by the legislature."

Kemp, J., was clearly influenced by considerations of the same kind. He says (p. 1212 of 28 *Bom. L. R.*):

"It will be noted that, prior to the Bombay Amending Act 12 of 1912, any confession made to a Police Officer in charge of a police station in the course of his invesitigation of any offence was disallowed. The Local Government could not have intended, by delegating the investigation of offences under the Abkari Act to an Abkari Inspector, to deprive a person accused of an offence under the Abkari Act of the protection he enjoyed under S. 25, Evidence Act, before Bombay Act 12 of 1912 was passed. To hold otherwise would be to cut down the protection intended to be afforded by S. 25, Evidence Act, which is an Act of the Government of India, to accused persons."

Now it is to be noted that there is no course of decisions to the effect that an Excise Officer is a Police Officer within the meaning of Cl. (4), S. 495, Criminal P. C. The only direct authority on the point, so far as we are aware, is the unreported case of this Court to which reference has already been made, and, so far as it goes, that would seem to be an authority the other way. Then at p. 1209, Marten, C. J., laid emphasis on another point:

"I should mention an argument addressed to us on S. 125, Evidence Act, to the effect that, as the legislature distinguishes there between Police Officers and Revenue Officers a similar distinction should be made in construing S. 25. I think the answer to that is given by Mr. Coelho. The Evidence Act was passed in 1872, and this particular provision in S. 125 was passed in 1887, and therefore before the present amended sections ot the Bombay Abkari Act came in force. For instance, the police powers given by the present Ss. 41, 41-A, 41-B and 41-C, were conferred by S. 25, Bombay Abkari (Amendment) Act, 1912 (Bombay Act 12 of 1912). It may therefore be that, since the Amending Act of 1912, certain Excise Officers in Bombay are Police Officers as well as Revenue Officers under S. 125. On the other hand, it does not follow that every Revenue Officer under S. 125 is also a Police Officer. It will depend on whether he has had conferred upon him the exceptional powers referred to in the Abkari Act."

Here and in the other passages in the judgment stress was laid on the fact that the Evidence Act was passed in 1872 when Excise Officers had no more than a limited power of arrest and could not be regarded as standing in the same position as Police Officers. But the Criminal Procedure Code was completely revised and amended in 1923, eleven years after the amendment of the Abkari Act by which the powers of investigation in question were conferred upon Excise Officers. So that, assuming that it is permissible to interpret an Act prospectively as it were and to adopt it to meet the changes in other legislation, there is no analogous reason for interpreting 'a Police Officer' in S. 495 (4) in a sense which would include an Excise Officer. The legislature in 1923 had no excuse for supposing that Police Officers, strictly so called, are the only persons empowered to investigate offences, or for supposing that the Courts in interpreting S. 495 (4), Criminal P. C., would

not interpret the expression strictly, but would apply it to Excise Officers also. The Full Bench decision is only binding on us if it is quite clear from the line of reasoning adopted that the Court would have held an Excise Officer to be a Police Officer under S. 495 (4), Criminal P. C., as well as under S. 25, Evidence Act, if that point had been before it for decision. For the reasons which I have indicated, I do not consider that that is by any means clear. I therefore agree with the order proposed by my learned brother in this case.

R.K. *Order accordingly.*

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* A. I. R. 1933 Bombay 239

PATKAR AND BARLEE, JJ.

Shankarrao Keshavrao Deshmukh and *another*—Plaintiffs—Appellants.

v.

Vadilal Mulchand Gujarati and *others*—Defendants—Respondents.

Second Appeal No. 770 of 1931, Decided on 15th December 1932, from decision of First Class Sub-Judge, Nasik, in Appeal No. 157 of 1929.

*** Contract Act (1872), S. 72—Deposit of amount after sale under O. 21, R. 89, Civil P.C., is in voluntary and cannot be recovered from decree-holder under S. 72, Contract Act—Civil P. C. (1908), O. 21, R. 89.**

If an owner, in order to save the property from sale, pays the amount to the decree holder, he can recover back the money so paid under S. 72, Contract Act, on the ground that the payment was involuntary or obtained by coercion. But where money is deposited after a sale to have the sale set aside under O. 21, R. 89, Civil P. C., his payment cannot be considered to be voluntary and cannot be recovered back under S. 72, Contract Act, from the decree-holder. He is only entitled to a declaration against the decree-holder that his property is not liable to be sold in execution of the decree: *A I R* 1921 *Bom* 169; *A I R* 1928 *Pat* 193 and *A I R* 1930 *Mad* 921, *Foll.* [P 241 C 1]

G. N. Thakore and *P. G. Patil* — for Appellants.

H. C. Coyajee and *Ramnath Shivlal*— for Respondents.

Patkar, J. — The mortgage bond, on which defendant 1 obtained a decree, was executed by one Balwantrao bin Nana Deshmukh as heir of Parvatibai for her debts, and Survey Nos. 159, 160, 161 and 162 belonging to her were mortgaged under the mortgage deed. According to the compromise in the partition suit of 1896 between the heirs of Parvatibai, Survey No. 159 was allotted to Keshavrao, the plaintiff's grandfather, free from the mortgage debt and the liability to pay the mortgage debt was allotted to the share of defendants 2 to 6. In execution of the partition decree the plaintiffs got possession of Survey No. 159. The mortgagee was not a party to the partition decree. The mortgagee brought a suit on the mortgage in 1914 against the members of the family to enforce the mortgage. The present plaintiffs were defendants 11 and 12 in that suit. During the pendency of the suit the mortgagee gave a purshis by which he consented to abide by the decree in the partition suit and had no objection to a decree being passed in accordance with the compromise in the partition suit. In execution notices were not served on defendants 11 and 12, who are the present plaintiffs, but only Survey No. 159 which was free from the mortgage-debt according to the compromise was sold. The plaintiffs paid the money then due by the other defendants. The present suit is brought by the plaintiffs to recover the amount from the mortgagee and the other defendants.

The learned Subordinate Judge held that the plaintiffs were entitled to recover the amount from the mortgagee and the other defendants. On appeal by the mortgagee, the appellate Court set aside the decree against the mortgagee on the ground that it was not shown that the mortgagee recovered the amount improperly and fraudulently. In second appeal it is contended that on the construction of the decree in the mortgage suit, Survey No. 159 was impliedly freed from the mortgage debt, and therefore the plaintiffs having paid the money under O. 21, R. 89, for setting aside the sale, were entitled to recover the amount back from the mortgagee. The plaintiffs have already obtained a decree in the lower Courts against the other defendants who had undertaken in the partition suit to pay the debt of defendant 1. The only question to be determined in this appeal is whether the plaintiffs are entitled to recover the amount paid by them from the mortgagee defendant 1. According to the purshis in the mortgage suit defendant 1 agreed that he had no objection to a decree being passed in terms of the compromise decree in the partition suit which exempted Survey No. 159 allotted to the share of the plaintiffs from the payment of the mortgage debt. The decree does not specifi-

cally refer to Survey No. 159 as being liable for the mortgage debt, nor does it expressly exempt Survey No. 159 from the mortgage liability. The plaintiffs were already in possession of Survey No. 159 before the institution of the suit by the mortgagee. The plaintiffs, who were defendants 11 and 12, were not made liable to pay the mortgage amount in the decretal order. The other defendants were ordered to pay the decretal debt with interest by instalments and in default the property was to be sold in accordance with S. 15-B, Dekkhan Agriculturists' Relief Act. The decree further directed that the property in the mortgage suit should be handed over to the other defendants. It is common ground that the property handed over to the other defendants according to the decree did not include Survey No. 159 which was admitted in the plaint to be in the possession of the present plaintiffs, who were defendants 11 and 12 in the mortgage suit, and order of costs was passed in favour of the plaintiffs to be paid by the other defendants.

The learned Subordinate Judge held that defendant 1 dishonestly put Survey No. 159 to sale though he knew full well that it was not liable for his mortgage debt. On appeal, the learned First Class Subordinate Judge with appellate powers held that it was not shown that the defendant fraudulently or improperly got Survey No. 159 sold in the execution proceedings. The execution proceedings were sent to the Collector and the Collector sold Survey No. 159 which was not specifically excluded from the mortgage decree though it was included in the plaint. It is contended on behalf of the respondent that though the mortgagee gave a purshis that he was willing to abide by the compromise decree in the partition suit and had no objection to a decree being passed in accordance with the compromise, no application was made to the Court for specifically excluding Survey No. 159 from the operation of the mortgage decree. It appears that the Collector in ignorance of the facts sold Survey No. 159 and the plaintiffs paid the amount under O. 21, R. 89, in the application for setting aside the sale. I think that, though there was no express exclusion of Survey No. 159 from the operation of the mortgage decree, the plaintiffs, who were defendants 11 and 12, were not made liable to pay the mortgage debt, nor is there a specific mention of Survey No. 159 being liable for the mortgage debt, and though reference is made in the decree to the suit property to be handed over to the other defendants, only the property comprised in the mortgage other than Survey No. 159 was given in the possession of the other defendants and Survey No. 159 was admitted in the plaint to be in the possession of the present plaintiffs. No notice was served on the present plaintiffs in execution proceedings. Under these circumstances, though Survey No. 159 was not expressly excluded from the mortgage decree, it appears that it was impliedly excluded from the mortgage decree. The present plaintiffs, so far as the mortgage decree is concerned, were in effect strangers to the mortgage decree. Therefore the property, Survey No. 159, was exonerated from the mortgage debt by the compromise in the partition suit which was consented to by the mortgagee in his suit. The mortgagee did not apply specifically for the sale of Survey No. 159. The decree was accompanied by the plaint which included the Survey No. 159. The decree was sent to the Collector for execution and the Collector in ignorance of what had transpired in the suit sold only Survey No. 159. It is not shown that the mortgagee defendant 1 fraudulently got the Survey No. 159 sold. No notice was served on the plaintiffs in execution though it was served on defendants 2, 4 to 6 and therefore the plaintiff could not contend that Survey No. 159 was not liable to be sold. When the property was attached, the plaintiffs could have applied for setting aside the attachment on the ground that it was not liable to be attached being impliedly freed from the mortgage-debt by the mortgage-decree. They did not pay the money to prevent the sale, but made the deposit under O. 21, R. 89 after the sale.

It has been held in *Jugdeo Narain Singh* v. *Raja Singh* (1) that money paid into Court to prevent the sale of the plaintiff's property, in execution of a decree against a former owner of the property, was not voluntary payment and that the plaintiff was entitled to

1. (1888) 15 Cal 656.

recover the amount from the decree-holder under S. 72, Contract Act. The same view was laid down by the Privy Council in the case of *Dooli Chand* v. *Ram Kishen Singh* (2) and in *Fatima Khatoon* v. *Mahomed Jan* (3). It was held by their Lordships of the Privy Council in the case of *Kanhaya Lal* v. *National Bank of India Ltd.* (4) that the word "coercion" in S. 72, Contract Act, is used in its general and ordinary sense, its meaning not being controlled by the definition of "coercion" in S. 15 of the Act, and that where the plaintiff, who was the sole proprietor of certain mills, was compelled to pay to the defendant under protest the money on a decree, obtained by the defendant against a limited company, under attachment against his property, he was entitled to recover back the amount on the ground that the payment was involuntary and was made under coercion under S. 72, Contract Act.

When the property of any person, which is not liable to be sold in execution of a decree, obtained against a third person, is attached, the true owner can apply to raise the attachment under O. 21, R. 58. In case his claim is disallowed, he can file a suit to establish his claim. But if the owner pays the money to remove the attachment, he can recover back the amount from the decree-holder according to the cases referred to above. If the property is sold, he can resist the auction-purchaser in getting possession of the property, and the purchaser can then apply under O. 21, R. 97, complaining of such resistance and obstruction, and the question as to the title to the property can then be decided. If the owner, in order to save the property from sale, pays the amount to the decree-holder, he can recover back the money so paid under S. 72, Contract Act, on the ground that the payment was involuntary or obtained by coercion. In the present case, the plaintiffs paid the money after the sale under O. 21, R. 89 to set aside the sale on payment to the decree-holder of the amount of the decree and five per cent of the sale price to the auction-purchaser. If the matter were res integra, it might have been possible to hold that the plaintiffs are entitled to recover back the amount under S. 72, Contract Act. The action of the plaintiffs would not be a voluntary payment of the debts of the other defendants 2 to 6 who were liable, but it was a payment made to save their property and get it back from the mortgagee-decree-holder who had wrongly allowed it to be sold in execution of the mortgage-decree. No doubt, they could have waited till the auction-purchaser came to dispossess them, and they could have driven the auction-purchaser to file an application under O. 21, R. 97 and the question of title would then have been determined. In *Kanhaya Lal* v. *National Bank of India, Ltd.* (5) it is observed (p. 163 of 50 *I. A.*):

"A wrongful interference with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interfence by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which, sooner or later, he might have rid himself of the interference But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in nowise bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded, and under English law he was unquestionably entitled to demand repayment of that sum because it was an involuntary payment produced by coercion, namely, the wrongful interference of the defendants with his full and free enjoyment of his own property. By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act or estop him from claiming that it was done under coercion."

The same case came again before the Privy Council in *Kanhaya Lal* v. *National Bank of India Ltd.* (5) where the same view was emphasized and it was held that as the plaintiff had a statutory right to recover the money under S. 72, Contract Act, his claim should not have been rejected on the ground that, upon a consideration of the whole circumstances it was not equitable that the money should be paid back. The sale of

2. (1881) 7 Cal 648=8 I A 93=4 Sar 245 (P C).
3. (1868) 12 M I A 65=10 W R 29 (P C).
4. (1913) 40 Cal 598=18 I C 949=40 I A 56 (P C).
5. A I R 1923 P C 114=75 I C 7=50 I A 162=4 Lah 284 (P C).

Survey No. 159 was a wrongful interference with the plaintiffs' enjoyment of their own property and the plaintiffs were entitled to rid themselves of the unlawful interference by any lawful means without thereby affecting their right to hold defendant 1 liable for what he had caused them to do. After the sale the only lawful means by which the plaintiffs could get rid of the unlawful interference of defendant 1 was by payment under O. 21, R. 89, and it was not competent to defendant 1 to prescribe some other way to put a stop to the wrong to which they were subjected.

But it has been held in the case of *Narayan* v. *Amgauda* (6) that under the terms of O. 21, R. 89, the amount paid must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally, and therefore no suit could lie for its recovery. In that case the defendant, who had obtained a decree against a third person, got the property sold and purchased it himself, and the plaintiff, who claimed to be the owner in possession of the property, got it set aside under O. 21, R. 89, by paying into Court the decretal amount and 5 per cent of the purchase money, and on the amount being paid to the decree-holder and auction-purchaser, the plaintiff sought to get it refunded. The decisions to which I have referred have been distinguished on the ground that the payment made under protest to get rid of an attachment to prevent a sale in execution stands on a different footing from the payment under O. 21, R. 89, in support of an application to set aside a sale of the right, title and interest of a third party held in execution of a decree. It was held in that case that under O. 21, R. 89, the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally, and that a person could not be allowed to go back on his own act and claim the amount back from the decree-holder after he had secured the benefit of having the sale set aside. The payment to the decree-holder of the amount deposited under R. 89 would amount to a satisfaction of the decree to that extent, and he could not be justly deprived of that benefit unless he could be restored to his original position under the decree. This view has been followed by the Patna High Court in the case of *Raghu Ram* v. *Deokali* (7), and by the Madras High Court in *Kummakutty* v. *Neelakandan Nambudri* (8).

The plaintiffs seem to have been all along under the impression that under the decree, which was not got amended by them, Survey No. 159 was liable to be sold. Otherwise it is inexplicable why defendant 9, the plaintiffs' pleader in the mortgage suit, was impleaded and was sought to be made liable on the ground that though as a matter of fact the decree does not release the property from the mortgage, the pleader intimated to them that the land was released from the mortgage liability. It is not contended that the plaintiffs made the payment under a mistake. The fraud alleged in the plaint has been negatived by the finding of the lower appellate Court. We have come to the conclusion, on the construction of the decree and the purshis of the mortgagee in the mortgage suit, that Survey No. 159 is not liable to be sold in execution of the mortgage-decree, and though, according to the decision in *Narayan* v. *Amgauda* (6), the plaintiffs are not entitled to recover back the amount from the mortgagee; they are entitled to a declaration against defendant 1 that the property is not liable to be sold in execution of the decree. It appears that the decree of defendant 1 was not fully satisfied by the sale of Survey No. 159. I would therefore vary the decree by awarding a declaration against defendant 1 that Survey No. 159 is not liable to be sold in execution of the mortgage-decree of defendant 1. Each party to bear his own costs of this appeal.

Barlee, J.—The important facts are these: Certain property including Survey No. 159 was mortgaged by the plaintiffs' grandfather to defendant 1. It was joint family property and later fell to the share of the plaintiffs' grandfather at a family partition between him and defendants 2 to 6. The family debts were divided at the same time and the debt due on the mortgage was assigned to another member of the family so that the plaintiffs' grandfather might enjoy Survey No. 159 free from the mortgage.

6. A I R 1921 Bom 169=62 I C 104=45 Bom 1094.

7. A I R 1928 Pat 193=115 I C 193=7 Pat 30.

8. A I R 1930 Mad 921=128 I C 509=53 Mad 943.

The mortgagee then filed a suit and of course impleaded the plaintiffs; but subsequently he agreed to the family arrangement and filed a formal purshis to record his agreement; and he accepted a decree against the other members of the family, defendants 2 to 6. Unfortunately the plaint was not amended by the omission of Survey No. 159, and this land was in consequence included in the list of property given in the first part of the decree, which embodies the plaint. But the final order makes it sufficiently clear that the debt was to be recovered from the other members of the plaintiffs' family (defendants 2 to 6 in this case) and in the alternative by the sale of their land and not Survey No. 159. This decree was framed in 1915. In 1923 the decree-holder filed a darkhast and issued notices to defendants 2 to 6 but not to the plaintiffs. The darkhast was transferred to the Collector and he sold Survey No. 159, the only land which should not have been sold. When the plaintiffs heard of the mistake they paid the auction price into Court with 5 per cent for the decree-holder and filed this suit to recover the amount from the mortgagee or in the alternative from defendants 2 to 6.

The ground on which the plaintiffs based the claim against the mortgagee defendant 1 was fraud. They pleaded that, in spite of the exclusion of the land, Survey No. 159, from the decree, defendant 1 had fraudulently put it up for sale and had it sold. The learned Subordinate Judge, who tried the case, held that fraud was proved and gave the plaintiffs a decree against all the defendants except defendant 9 who had been their pleader in the mortgage suit. On appeal however the learned First Class Subordinate Judge, A. P., modified the decree of the lower Court by disallowing the plaintiffs' claim against the mortgagee. The reasons given by him are that it was due to the negligence of the plaintiffs themselves that Survey No. 159 had not been excluded from the mortgage-decree, that the mortgagee had applied for execution of the mortgage-decree as it stood and had no power to do more, that it was quite improper to expect him to know what was in the mind of the Judge who passed the decree and that he was not to blame for the mistake of the Court passing the mortgage-decree:

"Similarly he writes it was not possible for the Collector who executed the decree to know what was intended by the Court by such implication. It has not been shown that defendant 1 specially applied for having a particular land sold either by the Court or by the Collector. Defendant 1 only described the property and specified all the survey numbers in his application for execution as they were specified in the decree."

On these grounds the learned appellate Judge decided that there had been no fraud. The facts on which we have to decide this second appeal are, therefore, that the decree excluded Survey No. 159, that owing to the negligence of the plaintiffs in not having the plaint in the mortgage suit amended, the decree in that suit as it was framed by the Court was ambiguous, that the mortgagee when he went to execute the decree did not ask for the sale of Survey No. 159 but simply filed a copy of the decree and asked for execution. Survey No. 159 was mentioned in the decree and the Collector of his own motion sold this number. In other words, the mortgagee had nothing to do with the mistake. Had he asked for the sale of Survey No. 159, knowing at the time that it had been excluded from the mortgage charge, he would certainly have been guilty of fraud. But as fraud has been negatived, we must take it that he did not do anything in the matter. The plaintiff therefore cannot succeed against the mortgagee on the ground of fraud. What we have to determine is whether he has a cause of action under S. 72, Contract Act, which enables a man to remove money paid by mistake or undue coercion. We have to consider whether there was coercion, for the payment was not made by mistake. The argument of his learned counsel is that the case is analogous to that of *Kanhaya Lal* v. *National Bank of India Limited* (4). The Bank obtained a decree against the Delhi Cotton Mills Ltd. and in execution attached certain mills at Sabzi Mandi and took possession of them. Kanhayalal, who claimed to be the sole proprietor, was ousted and he paid the sum claimed, under protest, and sued the Bank for a refund of his money. Their Lordships of the Privy Council held that he was entitled to succeed inasmuch as he had paid under legal coercion and was entitled to rid himself of the unlawful interference of the Bank by any lawful

means. Thus a payment into Court made to remove a trespass can be recovered by suit.

But according to the view adopted by a Bench of this Court in *Narayan* v. *Amgauda* (6), a payment made under O. 21, R. 89, to have a sale set aside is not a payment to remove a trespass. The facts of that case were similar to those in our case, if we negative the plea of fraud. *S* mortgaged certain land to *N* who obtained a decree for sale. *A* claimed the land as his, satisfied the decree, and sued for a refund. It was held by Sir Norman Macleod and Shah, J., that the payment was voluntary and not under coercion. *Kanhayalal's* case (5) was cited but distinguished and the main ground of distinction was that what had been sold was not the property which *A* claimed but the right, title and interest of *S* in it. There had been no actual trespass and on the assumption that the property belonged to *A* and not to the judgment-debtor *S*, there was no threat of trespass, their Lordships considered, against the property of *A*, for *A* by paying the debt of *S* was protecting not his own property which was not in danger, but the non-existent right, title and interest of *S* in that property. This view has been expressed by Kulwant Sahay, J., in *Raghu Ram Pandey* v. *Deokali Pande*(7) in the following terms (p. 32 of 7 *Pat.*):

> "If the property sought to be sold does not really belong to the judgment-debtor, then the sale of the property in execution of a money decree will not affect the rightful owner of the property and he can ignore the sale and resist the auction-purchaser in his attempt to take possession after the sale. A person who is the owner of the property is not affected by a sale of the right, title and interest of the judgment-debtor to whom the property does not belong."

This decision of our own Court has been followed also by the Madras High Court in *Kummakutty* v. *Neelakandan Nambudri* (8), and is binding on us. The plaintiff therefore cannot get a refund. But I agree that we can give a declaration as proposed by my learned brother:

K.S. *Decree varied.*

A. I. R. 1933 Bombay 244

MURPHY AND NANAVATI, JJ.

Gururao Narsingrao and *others* — Applicants.

v.

Ramchandra Srinivasrao—Opponent.

Civil Appln. No. 583 of 1932, Decided on 21st September 1932.

Privy Council Rules 14 and 15—Certificate for leave to appeal granted — Subsequent compromise—High Court cannot pass decree in terms of compromise—Civil P. C. (1908), S. 109 and O. 33, R. 1.

Where after the grant of certificate for leave to appeal to the Privy Council, the parties compromise the suit and apply to the High Court to pass a decree in terms of the compromise the High Court cannot do so by superseding the first decree: 4 *I C* 454, *Dist.* [P 244 C 2]

H. B. Gumaste—for Applicants.

Nilkant Atmaram—for Opponent.

Murphy, J.—This application arises out of F. A. No. 508 of 1927, decided by this Court. The petitioners, who were parties to the appeal, applied for leave to appeal to His Majesty in Council, and a certificate was granted them, the rule being made absolute on 13th August 1931. It is now stated in the civil application before us that the petitioners have paid into Court the necessary amount as security for the costs of opponent, and also the sum required for translating and printing the record and that the appeal has been declared admitted; but that meanwhile the parties have entered into a compromise in the terms stated in the body of the application, and now pray that this Court should supersede its first decree and pass one in the terms of the compromise.

There is no doubt that a compromise has been arrived at. But our difficulty is that we do not see how this Court, having once made a decree in the matter, can even by consent make a second one superseding the first. The learned counsel for both sides have referred to the rules of 1925, and to a ruling to be found in *Jadunandan Koer* v. *Ramjiban Lal* (1). The learned Judges in that case were dealing with a question of the substitution of parties. It was in 1905, when apparently there were no rules on the point, such as Rr. 14 and 15 of the Rules of 9th February 1920, which do not appear to have been abrogated by the Rules of 2nd May 1925. The reference is to a case of that Court which has not been reported, and apparently the ques-

1. (1909) 4 I C 454.

tion was one of the substitution of the names of deceased parties by those of their legal representatives as well as of a compromise. Apart from this authority the application has been argued on analogies of the powers of this Court in other matters, during the interval, after the appeal has been allowed, and before it has been made to His Majesty in Council. Some of these matters are provided for in O. 45, and others by rules, but there is no similar authority for the order which it is suggested that we should now make. Lastly, it has been urged that in the interval between the grant of leave to appeal and admission, and its presentation to the Registrar of His Majesty's Privy Council this Court is, in a measure, in the position to exercise some of the functions of His Majesty's Privy Council, and can therefore, when so acting, make orders which would not be within its capacity in the exercise of its ordinary jurisdiction.

It has also been contended that the Civil Procedure Code and the rules of the Judicial Committee are not exhaustive, and that an application can be made under S. 151, Civil P. C. We feel it impossible to accede to these arguments in so serious a matter as the substitution of a second decree for one already made by this Court, and we can find no authority, either in the arguments used before us, or in any reported decision of any of the High Courts, in favour of the application. It has also been said that to disallow this application will be a matter of hardship to the applicants, whose only other course is to obtain a certificate from us to the effect that the matter has been compromised, and then to make an application to His Majesty in Council. But this is obviously not the only way out of the difficulty, for the appeal can admittedly be withdrawn, and the adjustment arrived at between the parties can be certified to the Court under O. 21, R. 2. We think that we cannot make the order which we have been invited to do, and that the application must fail. Mr. Gumaste says that in view of the opinion just expressed by the Court, he wants further time in which to consider whether he should not amend his application, by adding a relief, to forward the compromise to His Majesty in Council, with the prayer that a decree may be passed in its terms. Mr. Nilkant Atmaram wishes to consult his client. Parties are granted 15 days' time in which to amend their application accordingly, if so advised.

Nanavati, J.—I agree.

K.S. *Application dismissed.*

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* A. I. R. 1933 Bombay 245

BAKER AND RANGNEKAR, JJ.

Umakant Balkrishna and *another*—Appellants.

v.

Martand Keshav and *others*—Respondents.

Second Appeal No. 519 of 1929, Decided on 8th November 1932, from decision of Dist. Judge, Ahmednagar.

(a) Civil P. C. (1908), O. 22—Hindu joint family manager dying—Whether his sons can be brought on record—*Quaere.*

Quaere—Whether on the death of the manager of a Hindu joint family his sons should be brought on record in accordance with the provisions of O. 22 : *A I R* 1930 *Mad* 561, *Ref.*

[P 247 C 2]

(b) Limitation Act (1908), S. 7—Coheirs—One cannot give discharge without other's consent.

One co-heir cannot give a valid discharge in respect of a debt due to the ancestor without the concurrence of the other coheirs : 35 *Mad* 685, *Rel on.*

[P 247 C 2]

***(c) Hindu Law — Joint family — Only manager can give valid discharge—Limitation Act, S. 7.**

In the case of a joint Hindu family it is only the manager who can bind the family in such thing such as discharge of a debt. A discharge given by any other member of the family is not therefore a valid discharge binding on the family : 35 *Mad* 685, *Expl.* ; 41 *Mad* 637 and 27 *Bom* 292, *Rel on.*; *Case-law considered.*

[P 249 C 2]

(d) Civil P. C. (1908), S. 115—Two appeals and one revision in cases disposed of by one judgment—Decision of lower Court held to be wrong in appeals—Revision should also be allowed.

Three cases were disposed of by one judgment and the applications to admit the appeals in two cases and the revisional application in the third were all made at the time. In the two appeals the decision of the lower appellate Court had been held to be wrong ;

Held : that it would be a denial of justice if the High Court interferes in the two cases and refuses to interfere in the third one. [P 250 C 2]

G. C. O'Gorman and *J. G. Rele*—for Appellants.

H. C. Coyajee and *D. R. Patwardhan*—for Respondents.

Rangnekar, J.—These two appeals and the revision application arise out of suits filed by one Balkrishna against the defendants to recover the amounts due to him on promissory notes passed in favour of "the shop of Balkrishna Saraf."

Shortly after the institution of the suit Balkrishna died, and on an application by his two sons, Umakant and Narhari, the plaint was amended and they were brought on record as heirs and legal representatives of the deceased plaintiff. The principal suit in which evidence was recorded was Suit No. 61 of 1925. The defendants put in a written statement in December 1925, and the main defence was that the claim of the plaintiffs under the promissory note was satisfied by payment made to Narhari, the younger son, in respect of which the latter had passed a receipt. It may be stated that the total principal sum due to the "shop of Balkrishna Waman Saraf" was about Rs. 5,380 exclusive of costs and interest. Besides that, there was an outstanding decree for Rs. 1,033 with interests and costs. According to the defendants they paid about Rupees 3,625 in full satisfaction of all these claims and obtained three receipts, the receipt relating to the claim in the principal suit being obtained in 1925. By his reply the plaintiff Umakant contended that the receipt passed by Narhari did not amount to a valid discharge of the debt which was due to the joint family, of which he and his father were members and of which he was the karta after the death of his father. He further contended that the payment, if any, was fraudulent inasmuch as it was made not only after a public notice given in two newspapers warning all the debtors of the shop not to make any payment to Narhari because he was a profligate and a wastrel and dissipating the family property, but even after a specific notice given to the defendants to the same effect. He further contended that nothing in fact was paid by the defendants to the plaintiff.

The receipt, Ex. 50, after referring to the respective promissory notes, stated that a settlement was made by mutual consent and the claim which came to more than Rs. 3,000 was settled for Rs. 2,500, which was paid in cash to Narhari. It further recited that if Umakant raised any objection in respect of the same, Narhari was to be liable for the same, and that on no account were the debtors to be troubled. This receipt as well as the others were admittedly passed by Narhari. The trial Court raised three issues which are at p. 8 of print. The learned Judge held that the alleged satisfaction relied upon by the defendants was not binding against plaintiff 1 as the manager of the family. He further held that in fact no moneys were paid to Narhari, and in the result he passed a decree in favour of the plaintiff. Defendants appealed to the District Judge from this judgment, and the learned District Judge held that, in any event, Narhari was bound to the extent of his share in the family property, but that Umakant was not. The learned Judge therefore modified the decree of the trial Court by ordering that the plaintiff should recover a half of the substantive amount decreed by the trial Court which would represent Umakant's share in the debt due to the family firm. Second Appeal No. 655 raises the same question in respect of the second promissory note between the parties, and the revisional application similarly relates to the claim of the plaintiff in respect of the third. It appears that by consent of the parties these cases were heard together and it was agreed that the decision in one case should govern the other two cases. Accordingly all these matters were heard together by both the Courts below and one judgment recorded. Subject to Mr. Limaye's objection as regards the revisional application, it is understood that the controversy between the parties in all these three cases should be determined by one judgment in this Court also.

It seems to me to be clear from the record that it was common ground that "the shop of Balkrishna Waman Saraf," as appears from the judgment of the learned District Judge

"was a joint family concern of which Balkrishna and his two sons, Umakant and Narhari, were owners as members of a joint Hindu family."

We must therefore take this finding and deal with the appeals on the footing that the promissory notes in question were passed in favour of the joint family consisting of Balkrishna and his two sons Umakant and Narhari. It is argued by the learned counsel on behalf of the defendants that there was nothing to show on the plaint, or on the face of the promissory notes, that there was any ancestral joint family business, and that therefore the position was that

the shop of Balkrishna Waman Saraf constituted a partnership between the father Balkrishna and his two sons, Umakant and Narhari. A short answer to the argument is that this case was never made out by or on behalf of the defendants, and that the burden of making out this case really rested on them. The position in law with regard to this question is clear. Where property has been acquired in business by persons constituting a joint Hindu family by their joint labour, the question arises whether the property so acquired is joint family property, or whether it is the joint property of the acquirers, or whether it is ordinary partnership property within the meaning of the Indian Contract Act. If it is the joint family property, the male issue of the acquirers take interest in it by birth. If it is the joint property of the acquirers, it will pass by survivorship, but their male issue will not take any interest in it by birth. If it is partnership property, then its devolution would be governed by the Contract Act. So that in each case different considerations would arise and different results follow, and if it was the contention of the defendants that this receipt which was challenged on behalf of Umakant was binding on him on the ground that the shop of Balkrishna Waman Saraf was a partnership concern and that the receipt was passed by one of the partners Narhari the burden of making out this case rested on the defendants. No issue on this point was asked for, no suggestion to this effect was made anywhere, and it is now too late for the learned counsel to raise this case in second appeal.

It was found by the trial Court that that no payment was made by defendants to Nathari, and that Narhari was a wastrel and dissipating the family moneys and executing receipts without receiving proper or adequate consideration. The finding of the trial Judge was accepted by the appellate Judge as regards Narhari's character, position and antecedents. The learned District Jndge however came to the conclusion that as it was not proved that Narhari was a lunatic or an idiot, he must have received something; but what he received the learned Judge was unable to state. This is what he says at p. 4:

"I am therefore of the opinion that the receipts in question must have been passed by Narhari after taking some amounts, the exact quantity of which it is difficult to determine."

Speaking for myself, it is difficult to accept this as a finding of fact. But fot the purpose of disposing of the point which arises in this case it may be assumed that some payment was made to Narhari when this receipt was passed. As stated above, after Balkrishna's death his two sons were brought on record. It is not necessary to consider the question whether in the case of a joint Hindu family when a suit is instituted by the manager on behalf of the family, whether on the death of the manager his sons should be brought on record in accordance with the provisions of O. 22, Civil P. C. It has been held by the Lahore High Court in *Atma Ram* v. *Banuku Mal* (1) that in such a case it is not necessary to bring the sons on record, but that the next succeeding karta should be brought on'record. One thing however is clear that neither the trial Court nor the appellate Court held that Umakant and Narhari were brought on record as heirs of Balkrishna. But assuming that they were brought on record as heirs, I think the appellants would be in a better position under the decisions of the Indian High Courts. If they were co-heirs, it seems to me that the defence in this case must fail, firstly, because one coheir cannot give a valid discharge in respect of a debt due to the ancestor without the concurrence of the other co-heirs, and, secondly, a fraudulent payment made to one coheir is under no circumstances a proper payment and would not amount to a valid discharge. In *Ankalamma* v. *Chenchayya* (2) it was held that one coheir by a single promise is not entitled to give a valid discharge in respect of a promissory note executed in favour of his ancestor. In *Ibrahim Tharagan* v. *Rama Aiyar* (3) it was held that payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all members or creditors if the payment is made fraudulently to one and not for the benefit of all. The learned District Judge accepted this position,

1. A. I. R. 1930 Lah 561=125 I C 369=11 Lah 598.
2. (1918) 41 Mad 637=45 I C 419.
3. (1911) 35 Mad 685=10 I C 874.

but he thought that under the decision in *Ibrahim Tharagan* v. *Rama Aiyar* (3) the person receiving payment would in any case be bound as regards his share in the debt. I am unable to agree with him. The only point which arose in that case was whether a fraudulent payment made to one coheir would amount to a valid discharge, and the answer was in the negative. In this case if it were necessary to express an opinion, I would hold that payment alleged to have been made to Narhari was a fraudulent payment, and therefore would not bind the other heir. But having accepted the authority in *Ibrahim Tharagan* v. *Rama Aiyar* (3), I think the conclusion to which the learned District Judge came was wrong. He says at p. 4:

" Assuming that Narhari has received something it would be most inequitable to give his firm, that is, to him and his brother, a decree for the whole amount due under the promissory note. If Narhari chose to wipe off these debts by receiving not even the full amount of his own share, it is his business and he cannot in equity claim any relief against a fraud to which he himself was a party."

I take exception to this part of the judgment where the learned Judge speaks of the share of Narhari in the debt. If, as in this case, it was a joint family debt, I am unable to understand how it can be said that a member of a family had a definite share in that debt, because under the ordinary Hindu law until partition no member of the family can as such say that he is entitled to any definite share in any particular family property. It may be stated that both Umakant and Narhari are not without issue.

In my opinion there are many points of resemblance between *Ankalamma* v. *Chenchayya* (2) and the present case. It was held in that case that the principles applicable in the case of coheirs would also be applicable to the case of coparceners. But I think the real question in this case is whether a discharge given by a junior member of a joint Hindu family amounts to a valid discharge of a debt due to the family, or whether in order to be binding on the family it must be given by the manager of the family. It has been found by the trial Court, and there is no finding of the District Judge on this point, that Umakant was the manager of the family to the knowledge of the defendants. In the absence of any evidence to the contrary, I think under Hindu law the eldest son of the deceased father would be the karta of the family. According to Manu the father in the case of a joint Hindu family is the manager of the family consisting of himself and his descendants and other relations. After the death of the father the eldest son generally becomes the manager or karta of the family, though it is possible that a more capable son may become the manager. The joint family is governed on the principle of subordination and its affairs are managed by one person whose acts within the scope of his authority are binding on the family. Manu says in Ch. 9:

"As a father (supports) his sons, so let the eldest support his younger brothers, and let them also in accordance with the law behave towards their eldest brother as sons (behave towards their father)." (108). "The eldest alone may take the whole paternal estate, the others shall live under him just as (they lived) under their father." (105).

To the same effect is the text of Narada in Ch. 13:

"Or the senior brother shall maintain all (the junior brothers), like a father, if they wish it, or even the youngest brother, if able; the well-being of a family depends on the ability (of its head):" (5) [Sacred Books of the East].

Apart from the finding therefore to which I have referred, I think, even under the ordinary Hindu law Umakant would be the karta of the family. The position of the karta has been defined and recognized in several well-known decisions of the Courts. Speaking generally, the karta represents the joint family in all its affairs and transactions or concerns with the outside world, provided they are for family necessity. In an early decision of this Court it was held that a Hindu family is regarded as a corporation whose interests are necessarily centred in the manager, the presumption being that the manager is acting for the family unless the contrary is shown: *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (4). He has power to contract debts and borrow moneys for legitimate and proper purposes of the family, and then his acts would bind the family. In *Kishen Parshad* v. *Har Narain Singh* (5), their Lordships of the Privy Council held that

4. (1883) 7 Bom 467.
5. (1911) 33 All 272=9 I C 739=38 I A 45 (PC).

besides the power to contract debts for the family business, the manager has the power of making contracts, giving receipts, and compromising or discharging claims ordinarily incidental to the business, and without a general power of that kind, it would be impossible for the business to be carried on. In *Pitam Singh* v. *Ujagar Singh* (6) it was held that a compromise entered into by the manager bona fide for the benefit of the family binds the other members of the family including the minors. In *Jagan Nath* v. *Mannu Lal* (7) it was held that the manager has the power to refer to arbitration disputes relating to the joint family property, provided such reference is for the benefit of the family.

In *Bapu Tatya* v. *Bala Ravji* (8) it was held that the manager has power to give a valid discharge for a debt due to the joint family, and hence if one of the members is a minor, he cannot claim the benefit of S. 7, Lim. Act. This case was followed in another decision of the same Court in *Supdu Daulatsing* v. *Sakharam Ramji* (9). Recently the legislature by the Limitation (Amendment) Act, 1 of 1927, has provided that in respect of a liability of a Hindu undivided family an acknowledgment or payment made by the manager shall be deemed to have been made on behalf of the family so as to keep the debt alive. These are some of the principal powers of the manager or the karta as such in addition to the power of alienating the family property within defined limits. The decisions of the Privy Council in *Kishen Parshad* v. *Har Narain Singh* (5) and *Sheo Shankar Ram* v. *Jaddo Kunwar* (10), lay down the principle that in respect of transactions entered into by the manager in his name on behalf of the family he may sue or be sued alone, and that the other members of the family are not necessary parties to such a suit, and on the other hand would be bound by the decree made therein. This being then the position as to the rights and powers of the manager, I think it is but a logical corollary from these principles to hold that in the case of a joint Hindu family it is only the manager who can bind the family in such things such as discharge of a debt. It must therefore folllow that a discharge given by any other member of the family would not be a valid discharge binding on the family.

I may now refer to a decision of our Court in *Sitaram* v. *Shridhar* (11). That was a case of a mortgage, and it was laid down in that case that where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, does not amount to a valid discharge to the mortgagor. The learned counsel for the respondents relies on the concluding part of this judgment in which payment received by one of the heirs of the mortgagee was recognized and treated as a valid payment and was taken into account in passing a redemption decree. But the judgment makes it clear that as all the parties interested in the mortgage were before the Court it was not desirable to send them to a fresh litigation, because the Court was in a position to give complete relief without altering the nature of the case. It is clear therefore that the learned Judges proceeded on equitable principles because they felt that on the materials before them they were able to do complete justice. Speaking for myself, I think it is difficult for us on the facts in this case to give relief to defendants, if they are entitled to any, on this equitable principle, because, as I have pointed out, the finding of the trial Court was that no payment to Narhari was proved and the finding of the District Judge is too vague for the Court to act upon. If however the defendants are entitled to proceed against Narhari and have a remedy in law they may be entitled to adopt it. In my opinion therefore the receipt passed by Narhari does not amount to a valid discharge and is not binding on the family.

Before parting with the case, I may refer to a point raised by the learned counsel on behalf of the plaintiff in support of his appeal. He contended that the defendants pleaded accord and satisfaction, and the plea failed as the find-

6. (1871) 1 All 651.
7. (1894) 16 All 231=(1894) A W N 60.
8. A I R 1921 Bom 289=59 I C 759=45 Bom 446.
9. A I R 1929 Bom 13=110 I C 276=52 Bom 441.
10. A I R 1914 P C 136=24 I C 504=41 I A 216=36 All 383 (PC).
11. (1903) 27 Bom 292=5 Bom L R 91.

ing of the learned District Judge amounted to this: that a smaller sum was paid to the creditors in discharge of the debt. I am unable to accept this argument, as it seems to me there is a clear difference between the English and the Indian law on this point. In England the law is clear that you cannot discharge a debt by payment of a smaller sum where the debt is in respect of a liquidated amount. But our law is quite different and under S. 63, Contract Act, every promisee may dispense with, or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit. The commentary on that section in Pollock and Mulla's Contract Act, states clearly that the section makes a wide departure from the English Common law. For these reasons, I think, the judgment of the District Judge in the two appeals must be reversed and that of the trial Court must be restored with all costs throughout. The cross-objections in Second Appeal No. 519 of 1929 are not pressed, and they must also be dismissed with costs.

There now remains the civil revision application which, as I have stated, r lates to a promissory note for Rs. 370. Mr. Limaye's point is that the application is not competent under S. 115, Civil P. C., inasmuch as there is no question of jurisdiction involved in this case. As I have pointed out, the parties in this litigation agreed that all the three suits should be heard together, evidence in one should be treated as evidence in others and that one judgment should govern all the cases. The point was exactly the same in all the cases, and if I have held that the learned District Judge was wrong in modifying the decree of the trial Court in one, it must follow that his decision in the remaining suits is wrong. Therefore, the decree made by the District Judge in this case is also set aside and that of the trial Court restored with all costs throughout.

Baker, J.—I agree. My learned brother has exhaustively dealt with the question of the plaintiffs being the members of a joint family. If they are regarded merely in the capacity of the heirs of a single promisee, the release of the debt by one of the heirs of the deceased creditor would not be a valid discharge in view of the authority in *Sitaram* v. *Shridhar* (11). But so far as the question of the alleged payment to Narhari is concerned, altogether putting aside the fact that there is evidence that notice was sent to the defendants not to pay Narhari, there is a small point which has not been mentioned by the Courts below, as far as I know; and it is this: According to the contention of the defendants the sum of Rs. 2,500 for which the receipt was passed was paid to Narhari on 25th November 1925, and yet a little over a fortnight later, i. e., on 11th December 1925, Narhari writes Ex. 74 in which he states that he is unable to return from Shahabad for want of money. If that means anything it means that he was not able to raise a few rupees within 16 days of his having received so large a sum as Rs. 2,500. This is a very clear indication that all the story about payment made to Narhari is false. My learned brother has pointed out that the finding of the District Judge that Narhari must have received something, although he cannot find what amount he actually received, is not really a finding of fact. In this view of the circumstances to which I have just alluded if it was necessary for me to come to a finding on the question of fact, I should hold that nothing was paid to Narhari. In these circumstances, I agree that the judgment of the appellate Court cannot be sustained and that the appeals should be allowed with costs. With regard to the revisional application my learned brother has already dealt with that point.

If that application had come alone for decision, difficulty might have arisen on the question of jurisdiction But as a matter of fact all these casee were disposed of by one judgment, and the applications to admit the appealsand the revisional application were all made at the same time. Where in the two appeals as in the present case the decision of the lower appellate Court has been held to be wrong, I think it would be a denial of justice if we interfere in the two cases and refuse to interfere in the third. I therefore agree that the application must be allowod and the

rule must be made absolute with costs throughout.

R.K. *Decree reversed.*

A. I. R. 1933 Bombay 251

MURPHY AND NANAVATI, JJ.

Jivanlal Vrajrai Desai—Applicant.

v.

Vrajlal Pochalal Patel—Opponent.

Civil Appln. No. 176 of 1932, Decided on 23rd September 1932, for leave to appeal to His Majesty in Council.

(a) Limitation Act (1908), Art. 179—High Court sending down issue for finding of lower Court under O. 41, R. 25 and passing decree after receipt of such finding—Order sending down issue is not final order and leave to appeal can be applied for within 90 days from final decree.

The High Court in an interlocutory judgment having set aside the conclusions but not the decree of the lower Court sent down an issue for finding of the lower Court.. On receipt of finding, it passed a decree.

Held: that the order of sending down the issue for finding of the lower Court was one under O. 41, R. 25, that it was not a final order and that an application for leave to appeal to the Privy Council can be made within 90 days from the final decree : 17 *All* 112 (*P C*) and 15 *Bom* 155 (*P C*), *Dist.* [P 252 C 1]

(b) Civil P. C. (1908), S. 105 (1)—Principle of S. 105 (1) applies to Privy Council appeal.

Though S. 105 (2) does not apply to appeals to the Privy Council, the principle of S. 105 (1) can be applied to such appeals. [P 252 C 1]

G. N. Thakor and *M. K. Thakore*—for Applicant.

A. G. Desai—for Opponent.

Nanavati, J.—Applicants ask for leave to appeal to His Majesty in Council against a decree of this Court for a sum of Rs. 32,791-15-6. This Court reversed the decree of the original Court, and prima facie leave would be granted as a matter of course. But Mr. Desai for the respondent has objected to the grant of leave, on the ground that on 14th January 1931, this Court passed an order, which he contends was a final order under S. 109, Civil P. C., against which the applicant was bound to appeal, and that he not having done so, is now barred by limitation from challenging that order. He urges that the points taken in the memorandum of appeal are all directed against the finding reached in the order of 14th January 1931 and he therefore contends that such an appeal is now barred. The judgment of this Court of 14th January 1931 is headed "Interlocutory Judgment." It set aside the conclusion of the trial Court that the defendants-lessors were under no liability to replace the buildings and machinery on a certain piece of leased land, which had been destroyed or damaged by fire. The trial Court had not gone into the questions whether the plaintiff had spent the amount mentioned by him in the plaint on the building and the machinery, and whether the defendants were bound to pay this sum or any portion thereof, and had dismissed the suit with costs. The High Court having come to the conclusion that the defendants were liable, sent down the following issue for a finding to be returned to this Court within three months :

"What amount has the plaintiff-appellant expended on the building and the chimney in 1924 and how much are the defendants liable to repay under Cl. 18 of the agreement Ex. 38?"

On the finding of the trial Court being returned by its judgment, dated 18th November 1931, this Court made the decree in favour of the plaintiff for Rs. 32,791-15-6 with interest and costs. In the first place, I cannot agree with Mr. Desai's contention that the order of 14th January 1931 was a final order of the kind referred to in S. 109. Although it says, "We allow the appeal," and mentions that costs were to abide the final decree, yet it did not in terms set aside the decree of the lower Court. All that the Court purported to do was to send down an issue for a finding, under O. 41, R. 25. Mr. Desai has relied on two cases for the view that such an order must be regarded as a final order, viz., *Muzhar Hossein* v. *Mt. Bodha Bibi* (1) and *Rahimbhoy Habibboy* v. *C. A. Turner* (2). In *Muzhar Hossein* v. *Mt. Bodha Bibi* (1) the order of the High Court remanding the case to the lower Court was under S. 562 of the old Code, which corresponds to O. 41, R. 23. When acting under that section, the Court reverses the decree of the trial Court and remands the suit to that Court with directions to re-admit the suit under its original number and proceed to determine it. The appellate Court therefore, when passing such an order, washes its hands of the matter, and directs the Subordinate Court to dispose of it according to law. That is not what happens when an order is made under O. 41, R. 25 nor has it happened in the case

1. (1894) 17 All 112=22 I A 1 (P C).
2. (1890) 15 Bom 155=18 I A 6 (P C).

before us, because the order of the High Court of 14th January 1931, left the decree of the trial Court standing, which was in favour of the applicant. It would be a most anomalous position if a party were bound to go in appeal to His Majesty in Council when he had a decree standing in his favour. In the Bombay case relied on by Mr. Desai, there had been a preliminary decree for accounts which on appeal was confirmed and leave to the Privy Council was refused by the High Court at that stage, but the appeal was admitted by the Privy Council on an application for special leave. Now, I do not think that an interlocutory order sending down an issue to the lower Court can be put on the same footing as a decree confirming a preliminary decree for accounts. The High Court had dismissed the appeal and disposed of the case as far as that Court was concerned. But in the case before us the High Court disposed of the appeal only by its judgment of 18th November 1931. I do not think therefore that either of the two cases really supports Mr. Desai's contention.

The second answer of Mr. Thakor to the objection taken is that it is not disputed that his client has a right of appeal against the decree passed by this Court on the judgment of 18th November 1931, and that when he has that right, it is for the Court to which he appeals to consider what points he is entitled to urge in such an appeal. I think this contention is right. Moreover, if the principle of S. 105 (1), Civil P. C., applies, it is clear that in an appeal from a decree the appellant is entitled to challenge it on the ground of any error, defect or irregularity in any order affecting the decision of the case. It is true that S. 105 (2), Civil P. C., does not apply to appeals to the Privy Council, but I see no reason why the principle of S. 105 (1) should not be applicable to such appeals. Indeed the fact that S. 105 (2) does not apply to Privy Council appeals is an argument against Mr. Desai's present contention. If an appeal to that tribunal cannot be ruled out on the ground that the party concerned did not appeal against an order of remand by which the case was disposed of as far as the appellate Court was concerned, much less can it be barred by reason of the party not having appealed against an order sending down an issue to the lower Court. The former is clearly better entitled to the description "final order" than the latter kind of order.

The third ground taken by Mr. Thakor was that if he was obliged to appeal against the order of 14th January 1931, it was not possible for him to put a valuation on the appeal, because it had not then been determined what sum he was liable to pay. There might be an answer to this contention, but I think that on both the grounds mentioned before the applicant has a right to go to His Majesty in appeal, though he did not file any appeal against the order of 14th January 1931. In my opinion therefore the objection has no substance, and the application must be granted. A certificate will be granted that as regards amount or value and nature the case fulfils the requirements of S. 110, Civil P. C. Costs to be costs in the appeal.

Murphy, J.—I agree.

K.S. *Application granted.*

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* A. I. R. 1933 Bombay 252

BEAUMONT, C. J. AND BAKER, J.

Vishwanath Raghunath Kale— Applicant.

v.

Mahadeo Rajaram Saraf—Opponent.

Civil Revn. Appln. 426 of 1931, Decided on 19th January 1933.

*** Limitation Act (1908), S. 20—Payment within limitation period but acknowledgment subsequent to period of limitation saves limitation.**

A payment within the period of limitation saves limitation provided there is an acknowledgment in writing. It does not matter even if the acknowledgment is made beyond the period of limitation as it is the payment and not the acknowledgment which saves limitation. The acknowledgment is merely a matter of evidence and provided it is signed before the suit is commenced, is sufficient : 17 *Mad* 92, *Ref.* [P 253 C 1, 2]

G. S. Gupte—for Applicant.

V. D. Limaye—for Opponent.

Beaumont, C. J.—This is an application to revise an order made by the Small Cause Court Judge at Nasik. The learned Judge dismissed the plaintiffs' suit on the ground that it was barred by limitation. The plaintiffs sued on a promissory note dated 29th May 1925. There were various part payments of principal secured by that note. The first payment was made on 18th October 1925, the second on 4th November 1926,

and the third on 5th October 1927, all those being within three years from the date of the promissory note. Then there was a fourth payment made on 2nd June 1928, and on that date an acknowledgment was signed by the defendant admitting all the past payments including the payment on 2nd June 1928. This suit was brought on 4th June 1931. It is admitted by the defendant that the Court was closed on 2nd and 3rd June 1931, and therefore although the period of limitation prescribed by Art. 73, Limitation Act, expired on 2nd June 1931, under S. 4 the plaintiffs would have a right to bring this suit on 4th June 1931, if they could have brought it on 2nd June 1931. The learned trial Judge was of opinion that the suit was barred because the acknowledgment of the part payment was made more than three years from the date of the promissory note. S. 20 of the Act, provides, so far as relates to part payments, that where part of the principal of a debt is before the expiration of the prescribed period paid by the debter or by his agent duly authorized in this behalf a fresh period of limitation shall be computed from the time when the payment was made, provided that an acknowledgment of the payment appears in the handwriting of or in a writing signed by the person making the payment.

Now the effect of each part payment, provided it was made within the prescribed period and was acknowledged in writing was to start a new period of three years running. So that the payment of 5th October 1927, extended the prescribed period to 5th October 1930, provided there was the requisite acknowledgment in writing. Now the acknowledgment in writing of the payment was made on 2nd June 1928, which is beyond the period of three years from the date of the promissory note, and the learned Judge was of opinion that an acknowledgment outside the prescribed period was no good. But in that view I think he was wrong. It is true that the payment has to be made within the prescribed period, but the Act does not provide that the acknowledgment is to be made within that period. It is the payment, and not the acknowledgment which extends the period of limitation. The acknowledgment is merely a matter of evidence and provided it is signed before the suit is commenced, that appears to me to be sufficient. So that we have this, that by the payment of 5th October 1927, duly acknowledged on 2nd June 1928, the prescribed period was extended until 1930 : consequently the payment on 2nd June 1928, was within that prescribed period, and that payment was duly acknowledged on that date. That being so, it appears to me that the plaintiffs had until 2nd June 1931, to bring their suit under Art. 73, and then S. 4 of the Act extended the period until the Court was sitting. As the suit was commenced on 4th June, which was the day on which the Court opened, it was, in my opinion, in time. That being so, the applicction must be allowed with costs. Suit remanded to the lower Court to deal with the other issues. Costs of the suit to be dealt with by the lower Court.

Baker, J.—I agree. In this case it is the payments which will operate to extend the limitation and not the endorsement on the bond. It was held in *Venkatasubbu* v. *Appusundaram* (1) that it is not necessary that the endorsement should be made at the same time as the payments. Nor does the Act say so, The point therefore is whether the endorsements serve to save limitation by the payments. The endorsements of the payments are there ; the part payments of the principal will operate to extend the period of limitation and on this view of the case the suit is in time.

K.S. *Application allowed.*

1. (1893) 17 Mad 92.

A. I. R. 1933 Bombay 253

BAKER, J.

Shri Satyadhyana Tirth—Appellant.

v.

Bhujang Chintaman Nadgauda and *others*—Respondents.

Second Appeal No. 236 of 1930, Decided on 12th December 1932, from decision of Dist. Judge, Belgaum, in Appeal No. 67 of 1928.

Limitation Act (1908), Art. 144 — Math property gifted — Suit to recover property after 12 years is barred.

Where property belonging to a religious foundation has been alienated (gifted) adverse possession runs against the manager and his successor and a suit to recover such property 12 years after the alienation is barred : 23 *Cal* 536, *Expl* and *Rel on*: *A I R* 1922 *P C* 123, *Rel on*; *A I R* 1926 *Mad* 769, *Diss. from.*

[P 255 C 2]

R. A. Jahagirdar—for Appellant.

B. D. Belvi—for Respondents.

Judgment.—The plaintiff, who is the Swami of the Uttaradhi Math, sued the defendants to recover possession of some property alleged to belong to the Math stated to have been gifted about 40 or 50 years ago by the then Swami of the Math,to one Krishnacharya Garlpad, the ancestor of defendants 8 and 9, the remaining defendants being transferees and tenants of Garlpad. A preliminary issue was framed as to whether the suit is in time. It was found that it was not in time, and it was dismissed. On appeal the District Judge of Belgaum framed two issues: (1) Has the plaintiff proved that the property in suit is comprised in a Hindu religious or charitable endowment ? and (2) if so, can a suit for the purpose of following such property be maintained, notwithstanding the lapse of any length of time ? and found in the negative on both these issues, and dismissed the suit. The plaintiff makes this second appeal.

It is conceded by the learned advocate for the appellant that Act 1 of 1929, by which limitation with regard to the recovery of property belonging to a religious or charitable endowment was altered, will not apply to the present suit, which is brought in 1924, but he contends that under the rulings of the Madras High Court there is no limitation for a suit of this character, and that *Nilmony Singh* v. *Jagabandhu Roy* (1), on which the lower Courts have relied, has been overruled by the Privy Council in *Vidya Varuthi* v. *Balusami Ayyar* (2). To this it is replied that there is no necessity to go into the question of limitation, inasmuch as the lower appellate Court has found that it is not proved that this land was part of the property of the Math, which is a finding of fact.

Taking the first point first,it is argued by the learned advocate for the appellant that there was no issue in the first Court about the property belonging to the Math, and no evidence was led on it, the suit being decided on a preliminary point of limitation. It appears however from the judgment of the lower appellate Court that the point as to whether the property in suit was comprised in a Hindu religious or charitable endowment was raised by the appellant, that is, the present appellant, and was decided against him in the absence of evidence. It is not quite correct to say that there is no evidence on this point, as I find in the judgment a reference to several Exs.68, 75, 74 and 76. Inasmuch as this point was raised by the appellant himself, I do not think that he can now contend that it should not have been considered by the lower Court.

However putting that aside, I am quite satisfied that the suit must fail on the question of limitation. The case on which the first Court relied, *Nilmony Singh* v. *Jagabandhu Roy* (1) was a suit in which the shebait of an idol sued in 1892 for recovery of property which had been alienated by the preceding shebait in 1857. It was held that the suit was barred by limitation either under Art.134 or Art. 144, Sch. 2, Lim. Act, and that the possession of the defendants, who professed to derive title not from the idol but ignoring its rights, must be taken to have become adverse to the idol from the dates of the two alienations, and each succeeding manager does not get a fresh start as far as the question of limitation is concerned, on the ground of his not deriving title from any previous manager. Now, although that case was disapproved by the Privy Council in *Vidya Varuthi* v. *Balusamt Ayyar* (2) it was disapproved on the point that Art. 134 does not apply to the case where the head of a Math has granted a permanent lease over a part of the Math property not proved to be a specific trust. It is to be noted that in the Privy Council case, whicn was one of a permanent lease, it was held that the preceding Mahant having permitted the plaintiffs to continue in possession and received rent (p. 855 *of* 44 *Mad.*);

> "Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can therefore only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death."

These observations with regard to the receipt of rent and the creation thereby of a new tenancy will have no application to the present case, where the pro-

1. (1896) 23 Cal 536.
2. A I R 1922 P C 123=65 I C 161=48 I A 302 =44 Mad 831 (P C).

perty was gifted absolutely about 50 years ago, and from that date the succeeding Mahants of the Math have received nothing from the defendants, nor has their title been acknowledged by them. There can be no question therefore of the creation of any new interest by the succeeding Mahants, that is, those who succeeded the Mahant who made the alienation, and ordinarily speaking, a Mahant having power only to alienate the property of a religious institution during his lifetime, adverse possession will commence from his death. That is clear from the judgment of the Privy Council themselves in *Vidya Varuthi* v. *Balusami Ayyar* (2) where they say (p. 855 *of* 44 *Mad.*):

"It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death."

That seems to me to be a clear authority for holding that on his death the possession became adverse, unless the succeeding Mahant in some way created a new tenancy or acknowledged the title of the alienees, as to which there is no evidence in the present case. The learned advocate for the appellant has relied on a recent Madras case, *Rama Reddy* v. *Rangadasan* (3). That was also a case of a sale. If that ruling lays down that there can be no adverse possession as against the manager of a Math, with great respect I am unable to follow it. It seems to be not in accordance with the judgment of the Privy Council which is referred to, and I may also refer to (p. 548 *of* 49 *Mad.*), where the Privy Council case of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (4) is referred to. That is a case in which the hereditary manager of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution. It was held that the possession delivered to the purchaser was adverse to the vendors, and after 12 years the successor of the vendor could not recover possession of the property conveyed. The Privy Council observed (p. 279):

"Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, Art. 144 of the same schedule is applicable to the property. That bars the suit after 12 years' adverse possession."

Although I have not found any Bombay ruling on the point, there are several rulings of the other High Courts as to adverse possession running against the manager and his successor where property belonging to a religious foundation has been alienated. But I rely on the observation of the Privy Council already referred to in *Vidya Varuthi* v. *Balusami Ayyar* (2). In these circumstances I agree with the lower Court in holding that the suit is barred by limitation, and the appeal therefore fails and is dismissed with costs.

R.K. *Appeal dismissed.*

3. A I R 1926 Mad 769=96 I C 371 = 49 Mad 543.
4. (1899) 23 Mad 271=27 I A 69 = 7 Sar 671 (P C).

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* A. I. R. 1933 Bombay 255

PATKAR AND BARLEE, JJ.

Nagappa Bandappa Kadadi—Appellant.

v.

Gurushantappa Shankrappa Umarji—Respondent.

First Appeal No. 22 of 1931, Decided on 22nd December 1932, from decision of First Class Sub-Judge, Bijapur.

*** (a) Limitation Act (1908), Art. 182 (2)—"Appeal," meaning explained — Appeal against order granting review though incompetent is still appeal.**

There is no definition of appeal in the Civil Procedure Code and any application by a party to an appellate Court asking to set aside a decision of a subordinate Court is an appeal within the ordinary acceptation of the term. An appeal is no less an appeal because it is irregular or incompetent. Hence an appeal against an order granting the review would be included in the above definition though it is incompetent: *A I R 1932 P C* 165, *Foll.* [P 257 C 2]

(b) Limitation Act (1908), Art. 182, Cl. (2)—"Final decree" means merely the final order by which appellate Court decides appeal.

Article 182, Cl. (2), has to be interpreted by giving the words their natural and ordinary meaning. The words "final decree" merely indicate the final order by which an appellate Court decided an appeal and they cannot be interpreted to mean that the decree must be one which finally disposes of the suit and merges in itself the decretal order of the original Court. The word "final" is used in contradistinction with "interlocutory." [P 260 C 1]

*** (c) Limitation Act (1908), Art. 182, Cl. (2)—Decree in partition suit—Appeal to High Court by one of defendants — Review application by another defendant in trial Court and decree reviewed—Appeal against order granting review to High Court—Dis-**

missal of both appeals — Limitation for execution of decree commences from date of High Court order.

A decree was passed in a partition suit against defendant 3 and in favour of defendants 1 and 2. Defendants 1 and 2 appealed to the High Court against the order and on the application of defendant 3 the decree was reviewed in the trial Court. Defendants 1 and 2 appealed to the High Court but both appeals were dismissed on preliminary grounds. An execution application was filed within three years from date of order of High Court but beyond three years from date of amended decree by the trial Court. It was contended that the application was barred by time as the appeal was not an appeal as it was dismissed on preliminary ground; and as it did not decide the rights of parties limitation ran from date of amended decree.

Held: that the appeal was no less an appeal even though it was incompetent, that the limitation ran from date of order of High Court and that application was in time: *A I R* 1932 *P C* 165, *Foll*; *A I R* 1914 *P C* 65 & 66 and *A I R* 1922 *P C* 187 *Dist*. [P 258 C 2]

H. C. Coyajee and *G. S. Mulgaonkar*—for Appellant.

B. G. Rao—for Respondent.

Patkar, J.—This is an appeal in execution of the decree in Suit No. 214 of 1923 against the order of the learned First Class Subordinate Judge dismissing the application of the applicant for the necessary certificate to be sent to the First Class Subordinate Judge at Sholapur under O. 21, Rr. 5 and 6, and for an order of transfer of the execution under S. 39, Civil P. C. The principal ground on which the learned First Class Subordinate Judge dismissed the application is that the application for execution is beyond time under Art. 182, Lim. Act.

It is necessary to state the facts which have given rise to the contention that the application for execution is barred by limitation. In Civil Suit No. 214 of 1923 the assignors of the appellant, who were defendants 1 and 2, had obtained a decree against defendant 3 on 14th December 1925 to the extent of Rs. 42,940. Defendant 3 applied for a review and Appeal No. 35 of 1926 was filed in the High Court against the original decree by defendant 2. In July 1926 the Subordinate Judge allowed the review application and on that date the decree was amended by reducing the amount to Rs. 27,940. Defendants 1 and 2 filed Appeal No. 65 of 1926 to the High Court against the order granting the review. But it appears that no appeal was filed against the final decree reducing the amount to Rs. 27 940. Both the appeals were dismissed by this Court. The judgment of the High Court is reported in *Shidramappa* v. *Gurushantappa* (1). Appeal No. 35, which was brought against the original decree, was dismissed on the ground that it ceased to exist having regard to the later developments in the case. Appeal No. 65 was dismissed on the ground that the lower Court had jurisdiction to grant the review and the appeal was not maintainable under the Civil Procedure Code against the order granting a review. An appeal could lie only on the grounds mentioned in O. 47, R. 7, as Cl. (w), R. 1, O. 43 had been repealed by a rule of this Court under S. 122, Civil P. C. The decision of the appeal was embodied in a decree in which the order of the lower Court was confirmed with costs. A decree was drawn up and an order of costs was also drawn up.

The learned Subordinate Judge held that time ran from the date of the amended decree which was 15th July 1926, and that the date of the decision in the appeal, 29th October 1928, did not give a fresh starting point of limitation under Cl. (2), Art. 182, Lim. Act. The reasons given by the learned Subordinate Judge are: (1) that the appeal was not from the decree sought to be executed; (2) that the appeal was notcompetent for the reasons given in the judgment of the High Court, and (3) that the appeal was disposed of on a preliminary objection raised by the respondent and was not heard and decided on the merits and there was no real adjudication on the merits. If there had been no appeal against the order granting the review, time would have begun to run from 15th July 1926, the date of the decision passed on review under Cl. (3), Art. 182. The question arising in this appeal is whether time begins to run from 29th October 1928, the date of the decree or order of the appellate Court where there has been an appeal. On behalf of the appellant reliance is strongly placed on the recent decision of the Privy Council in the case of *Nagendra Nath Dey* v. *Suresh Chandra Dey* (2), where it was held that the words of Art. 182, Cl. (2), are plain and without any qualification either as to the character of the appeal

1. A I R 1929 Bom 183=116 I C 227.
2. A I R 1932 P C 165=137 I C 529=59 I A 283=60 Cal 1=34 Bom L R 1065 (P C).

or as to the parties to it, and that where an appeal, irregular in form and insufficiently stamped, is dismissed both on the ground of irregularity and upon the merits, it is nevertheless an "appeal" within the meaning of Art. 182, Cl. (2); and though the judgment-debtors against whom execution is sought are not parties to the appeal, time only runs against the decree-holders from the date of the appellate Court's decree dismissing the appeal.

The facts in the present case are somewhat adjacent to the facts in the case of *Nagendra Nath Dey* (2). It appears that in that case the receiver had borrowed Rs. 18,000, from some of the co-sharers, and the result was that some of the cosharers were mortgagees and all the cosharers were mortgagors. A preliminary decree was passed at the instance of Madan Mohan, one of the cosharers and mortgagees, and, on 24th June 1920, the Subordinate Judge passed a final decree at the instance of the said Madan Mohan, though it was drawn up on 2nd August 1920. On 27th August Madan Mohan presented an application to the High Court purporting to appeal from the order of the Subordinate Judge alleging that no decree was drawn up. His objection was in respect of only a part of the decree in so far as the decision went against him in respect of the assignment from two of the cosharers and mortgage-decree-holders, and he did not join as parties to the appeal the other decree-holders or the judgment-debtors. The appeal which was insufficiently stamped was admitted and heard and was dismissed on the ground of irregularity and also on the merits. But the dismissal was embodied in a decree of the High Court dated 24th August 1922, and it was the effect of the appeal that was considered by their Lordships of the Privy Council, who held that though the appeal was incompetent and was insufficiently stamped, it was no less an appeal because it was irregular or incompetent.

On behalf of the respondent reliance has been placed on the decisions of the Privy Council in the case of *Abdul Majid* v. *Jawahir Lal* (3), *Batuk Nath* v. *Munni Dei* (4) and *Sachindra Nath* v. *Maharaj Bahadur Singh* (5), where it was held that the order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed against. Those cases related to a dismissal of appeal for want of prosecution, and it was therefore held that the appeal must be considered not to have been filed, and the appellant was in the same position as if he had not appealed at all. In the present case appeal No. 65 was not dismissed for want of prosecution. Notice was served, arguments were heard, and the order confirming the order of the lower Court was embodied in a decree of the High Court. It is however contended, first, that the appeal did not lie and was incompetent, and, secondly, that it did not decide the rights of the parties, and therefore was not a final decree of the appellate Court.

The remarks of the Privy Council that an appeal is no less an appeal because it is irregular or incompetent would dispose of the first contention. It is observed by their Lordships of the Privy Council that there is no definition of appeal in the Civil Procedure Code and that any application by a party to an appellate Court asking to set aside a decision of a Subordinate Court is an appeal within the ordinary acceptation of the term. The appeal against an order granting the review would be included in the above definition. If the appeal had been successful the previous unamended decree would have remained the only subsisting decree capable of execution and the subsequent amending decree ipso facto would have been of no effect. With regard to the second contention involving the meaning of the word "final" it appears that their Lordships of the Privy Council have not referred to the word "final" when they stated as follows:

> "They think that the question must be decided upon the plain words of the article: 'where there has been an appeal, time is to run from the date of the decree of the appellate Court."

It appears that the word "final" is used by antithesis to the word "interlocutory." If the word "final" was intended to be used in the sense of finally disposing of the rights of the parties to the suit, it appears that there would be

3. A I R 1914 P C 66=36 All 350 (P C).
4. A I R 1914 P C 65=23 I C 614=41 I A 104 =36 All 284 (P C).
5. A I R 1922 P C 187=74 I C 660=48 I A 335 =49 Cal 203 (P C).

no necessity to resort to Cl. 2, Art. 182 for counting the time from the date of the appellate decree, for if the decree of the appellate Court reverses the decree of the first Court or embodies the decision of the lower Court, in other words, if the decree of the lower Court is merged in the decree of the appellate Court, time must obviously run from the date of the appellate decree. Though under S. 37, Civil P. C., the application for execution is to be made to the Court of the first instance, it is the decree of the appellate Court that is being executed and time must run from the date of the appellate decree under Cl. (1), Art. 182. It is only when the decree sought to be executed is the decree of the lower Court and not merely of the appellate Court, and the appeal is with regard to a part of the decree or against any other decision in the suit which is sub judice between the parties that the question as to whether time would run from the date of the appellate decree would arise for decision, and Cl. (2), Art. 182 would come into operation. I think therefore that the words of Art. 182, Cl. (2), must be understood in their plain meaning and the question in each case is whether there has been an appeal, and if that is the case, time must run from the date of the decree of the appellate Court if the decision of the appellate Court is not interlocutory but final. In the present case, Appeal No. 65 was dismissed and the order of the lower Court was confirmed and that decision was embodied in the decree of this Court.

In *Narsingh Sewak Singh* v. *Madho Das* (6), where there had been a review of judgment and an appeal from the decree passed on review and such decree having been set aside an application was made for the execution of the original decree, it was held that time began to run not from the date of the decree sought to be executed but from the date of the decree of the appellate Court. It was further held that the words "where there has been an appeal" do not contemplate and mean only an appeal from the decree of which execution is sought but include an appeal from the decree passed on review where there has been a review of judgment on which such decree is based. It is not necessary to go into the cases cited in the judgment of the lower Court, for I think the question has to be decided in accordance with the Privy Council decision to which I have referred. Their Lordships of the Privy Council in *Nagendra Nath Dey's* case (2) also observe as follows (p. 1071 of 34 *B. L. R.*):

> "It is at least an intelligible rule that so long as there is any question sub judice between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court."

I think therefore that having regard to the recent Privy Council decision, the view taken by the lower Court is erroneous. We must therefore reverse the decree of the lower Court and direct the lower Court to dispose of the application on the merits. Costs of this appeal will be costs in execution.

Barlee, J.—I agree. The facts of this case are briefly as follows: The appellant is an assignee from defendants 1 and 2 in civil suit No. 214 of 1923 of their right under a decree against defendant 3 for Rs. 27,940. Defendants 1, 2, 3 and 4 and plaintiffs 1 and 2 were members of one family divided into three branches. Defendants 1 and 2 formed one branch, defendants 3 and 4 another branch and plaintiffs 1 and 2 a third branch. In 1918, wishing to divide they referred the question of division to an arbitrator who made an award on 5th September 1923. The plaintiffs applied in Suit No. 214 of 1923 to have the award filed. On 14th December 1925, the Subordinate Judge made a decree on the award. It provided inter alia that defendant 3 should pay Rupees 42,940 to defendants 1 and 2. On 6th March 1926, defendant 3, the judgment-debtor, applied for a review, but before the final order was passed on his application, defendant 2 had filed an appeal to this Court, (Appeal No. 35 of 1926), from the decree as it then stood. The next event was the order of the lower Court in the review application. On 15th July 1926, the Court allowed the application and amended the decree by reducing the amount to be paid by defendant 3 to Rs. 27,940. On this, defendants 1 and 2 filed Appeal No. 65 to this Court challenging therein the

6. (1882) 4 All 274=(1882) A W N 25.

right of the learned Subordinate Judge to review his first decree.

At this stage, then, there were in existence a decree of the lower Court as amended in review, an appeal against the original decree, and an appeal against the order in review. Both these appeals were dismissed by this Court, the first one because the decree appealed against had ceased to exist, and the second one, Appeal No. 65, because no ground for interference was shown. On 6th August 1929, defendants 1 and 2 assigned their rights to the present appellant. On 2nd September 1929 the present appellant made an application in execution. This application was filed more than three years after the amended decree but less than three years from the date of the decisions of the High Court in the appeals. The question, then, in this case is whether the appellant is entitled to the benefit of Art. 182, Cl. (2), that is whether he is entitled to count time from the date of the two orders of this Court in the appeals. That date was 29th October 1928. The learned Subordinate Judge has decided that the application is time-barred. His decision, based on a consideration of a number of authorities, which he has cited, is that time must be reckoned from the date of the amended decree, 15th July 1926, and cannot be enlarged by the operation of the second clause of Art. 182.

In appeal, Mr. Coyajee has relied on the recent Privy Council decision in the case of *Nagendra Nath Dey* v. *Suresh Chandra Dey* (2). The facts of that case were somewhat similar to those of the present case. There a mortgage-decree was passed on 24th June 1920. One of the decree-holders, a man named Madan Mohan, was dissatisfied with the order of the Subordinate Judge which disallowed his claim to be substituted for one of the other decree-holders, whose rights he claimed to have acquired and he appealed to the High Court, and his appeal purported to be against the order of the said Subordinate Judge of 24th June 1920, rejecting his claim against his co-plaintiff, and he did not join in the appeal the judgment-debtors, that is, the quarrel in the appeal was one between the two plaintiffs. He stated in his appeal that no decree had been drawn up and therefore, he was appealing against the order of the Subordinate Judge. That was not true. The appeal however, though irregular in form and insufficiently stamped, as stated by their Lordships at p. 1069 (of 34 *B L R*), was admitted and heard in due course and was dismissed. Later, in execution of the original decree, the question arose whether the terminus a quo was the date of the decision of the irregular appeal or the date of the original decree in suit, 24th June 1920. The case went to the Privy Council, where their Lordships, after setting out the facts stated as follows (p. 1069 of 34 *B.L.R.*):

"If the three years are to be calculated, as the respondents contend, from the date of the decree of the Subordinate Judge, viz. 24th June 1920, the application was manifestly out of time; it was within time if the critical date is that of the decree of the High Court of 24th August 1922, and the decision of this question depends on whether Madan Mohan's appeal which was dismissed on the latter date was an appeal within the meaning of the second clause in the third column of the article cited above (i. e. Art. 182). The Subordinate Judge held that it was, and that the application was in time; the judgment-debtor-respondents appealed and the High Court took the opposite view, and dismissed the application of the appellants."

Their Lordships, after quoting a number of decisions on the point, ruled as follows (p. 1070 of 34 *B.L.R.*):

"Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the article: "where there has been an appeal," time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitratory, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide."

This being the case, we have to decide on the plain meaning of the words, apart from authority, as to whether in the present case there has been an appeal which will enlarge the period of limitation. Certainly, it cannot be denied that there has been an appeal, and the argument that an appeal to come within the meaning of the article must be an appeal from an original decree cannot be accepted in view of their

Lordships' dictum that nothing must be added to the words of the Article. But there remains the question, what is the meaning of the term "final decree," and on this point we have heard an interesting argument. Mr. Rao contends that in this case there was no decree which can be called final. His view is that to be final a decree must be one which finally determines the rights of the parties to a suit, that is, it must be an appeal which confirms or varies an original decree of a lower Court. This view the learned advocate has supported by reference to two decisions of the Privy Council in *Abdul Majid* v. *Jawahir Lal* (3) and *Batuk Nath* v. *Munni Dei* (4), and one decision of the Privy Council which is in *Sachindra Nath Roy* v. *Maharaj Bahadur Singh* (5). But in none of these cases did the same question arise as we have to answer here. In each the order relied on as a final decree was merely one which dismissed an appeal for want of prosecution. We have to interpret the article by giving the words their natural and ordinary meaning, and I am of opinion therefore that the words "final decree" merely indicate the final order by which an appellate Court decides an appeal and that we cannot interpret the article to mean that the decree must be one which finally disposes of the suit and merges in itself the decretal order of the original Court. "Final" appears to be used in contradistinction with "interlocutory". If we were to hold that a decree cannot be final unless it merges in itself the decree of the first Court, we must confine this article to appeals from decrees, and there at once we are met with the difficulty that their Lordships of the Privy Council in *Nagendra Nath Dey's* case (2) have decided that there is no justification for confining the word "appeal" to appeals from decrees. In my opinion then the recent decision in that case has made it necessary for us to reverse the decision of the lower Court and allow the appeal.

K.S. *Appeal allowed.*

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PATKAR AND BARLEE, JJ.

(*Swami*) *Rajrajeshwarashram*—Applicant.

v.

Shri Sharda Peeth Math Dwarka—Opponent.

Civil Appln. No. 365 of 1932, Decided on 13th December 1932, for leave to appeal to Privy Council.

(a) Civil P. C. (1908), S. 109 (a)—High Court's decision on point of limitation remanding suit for decision on other cardinal points is not final order and no appeal lies under S. 109 (a).

The decision of the High Court on the point of limitation remanding the suit for decision on the other essential or cardinal points in the case is not a final order but an interlocutory order against which no appeal lies under S. 109 (a), Civil P. C. : *A I R* 1924 *Lah* 571 (*F B*), *Foll* ; 15 *Bom* 155 ; 17 *All* 112 (*P C*) ; *A I R* 1920 *P.C.* 86 and 33 *All* 391, *Ref.* [P 262 C 1]

(b) Civil P. C. (1908), S. 105 (2)—S. 105 (2) does not apply to appeals to Privy Council.

Where no appeal lies to the Privy Council under S. 109 (a) on the ground that the decision of the High Court is not a "final order" or a decree passed on appeal by the High Court, S. 105 (2) would have no application. S. 105 (2) does not apply to appeals to His Majesty in Council : 33 *All* 391 and *A I R* 1915 *Mad* 423, *Rel. on.* [P 262 C 1]

(c) Civil P. C. (1908), S. 109 (c)—S. 109 (c) is meant to meet special cases.

Section 109 (c) has been clearly intended to meet special cases such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance : 23 *All* 227 (*P C*) and *A I R* 1921 *P C* 25, *Rel. on.* [P 262 C 2]

G. C. O'Gorman, H. D. Nanavati and *T. H. Nanavati*—for Applicant.

H. C. Coyajee and *R. W. Desai*—for Opponent.

Patkar, J.—This is an application under S. 109 (a), Civil P. C., for leave to appeal to the Privy Council. We have treated this application as an application for leave to appeal under S. 109, Cl. (a) and also under Cl. (c), though no specific prayer is made in the application for leave to appeal under S. 109 (c), Civil P. C. This is a dispute between two rival claimants to the property which is in the possession of the District Judge under Regn. 8 of 1827. The lower Court held that the suit was barred by limitation. On appeal this Court came to a contrary conclusion and remanded the suit for decision on the merits. The question therefore in this application is whether an order reversing the decision

of the lower Court on the point of limitation and remanding the case for decision on the merits is a "final order" passed on appeal by the High Court within the meaning of S. 109 (a), Civil P. C. Several cases were cited before us. It however appears from the judgments of the Privy Council in *Rahimbhoy Habibhoy* v. *Turner* (1), *Syed Muzhar Husein* v. *Bodha Bibi* (2) and *Ramchand Manjimal* v. *Goverdhandas Vishandas* (3) that an order comprising the decision of the High Court upon a cardinal issue in a suit, that issue being one that goes to the foundation of the suit, and one that can never, while that decision stands, be disputed again, is a final order for the purposes of appeal to His Majesty in Council, notwithstanding that there may be subordinate inquiries yet to be made in disposing of the suit. The cardinal point in the suit is distinguishable from a preliminary point, e. g., misjoinder, limitation, res judicata, which excludes evidence of essential facts, and an order overruling the preliminary point renders remand necessary for determination of those essential facts. The order is final if it finally disposes of the rights of the parties.

This question has been discussed by the Full Bench of the Lahore High Court in *Sultan Singh* v. *Murli Dhar* (4). In that case the first Court dismissed the plaintiffs' suit on the ground that plaintiffs had no locus standi to sue. The High Court on appeal reversed this finding and remanded the case for decision on the merits. It was held that the order in that case to the effect that the plaintiffs had established their locus standi to bring the action, being purely a preliminary point and not dealing with the merits of the dispute, could not be considered as the principal matter in controversy within the meaning of the rule laid down by the Privy Council and was not therefore a "final decree" within the meaning of S. 109 (a), Civil P. C. It is contended on behalf of the appellant that the point of limitation is a cardinal point with regard to the rights of the parties, and if the decision of the Privy Council be ultimately in favour of the appellant the suit will be decided on that point alone. There seems to be some conflict of view as to the test to be applied in deciding as to whether the order is a final order or an interlocutory order. It is observed by Sir Shadi Lal, C. J., in *Sultan Singh* v. *Murli Dhar* (4) as follows (p. 334 of 5 *Lah*):

"According to one view, which appears to have been adopted by the Calcutta High Court, the test is whether the decision of the trial Court, if restored by the Privy Council, would put an end to the suit altogether. If this view is to prevail, almost every order of remand reversing the dismissal of a suit on a preliminary point would be appealable to the Privy Council. The other view is that no order can be treated as final unless it finally determines the rights of the parties."

The same view was expressed by Broadway, J., at p. 353 (of 5 *Lah*) as follows:

". . the determining factor is not the effect on the suit a decision in favour of the applicant would have if the proposed appeal to the Privy Council were successful, but the immediate effect on the suit of the order sought to be appealed against."

In the present case the question of limitation was decided against the plaintiff by the lower Court. That finding was reversed by the High Court. The decision of the High Court does not put an end to the contentions of the parties, for it appears that a previous suit brought by the defendant abated and he has no right to bring another suit. Even if the plaintiff's suit for declaration was thrown out on the ground of limitation his remedy would be lost, but his right would not be determined; and as I have observed in my judgment the conditions of things would come to an impasse if the rights of the parties are not determined. The litigation came to the High Court three times and it was decided that the real question between the parties is as to who is entitled to the property, and that right ought to be determined in these proceedings. It appears that the essential or the cardinal point in the case has not been touched, and much time is lost in litigating upon an issue which does not bear upon the rights of the parties. The order of the High Court that the suit is within time has not finally disposed of the suit and has resulted in a remand for determination of the cardinal points in the case.

There is also another difficulty in allowing the application under S. 109 (a), Civil P. C., as the previous decisions of

1. (1890) 15 Bom 155=18 I A 6 (P C).
2. (1894) 17 All 112=22 I A 1 (P C).
3. A I R 1920 P C 86=56 I C 302=47 I A 124=47 Cal 918.
4. A I R 1924 Lah 571=80 I C 366=5 Lah 329 (F B).

this Court in *Aben Sha* v. *Cassirao Baba Saheb* (5) and *Ishvargar Budghar* v. *Caudasama Amarsang* (6) have taken a view against the contention of the applicant. I think therefore that the decision of the High Court on the point of limitation remanding the suit for decision on the other essential or cardinal points in the case is not a final order but an interlocutory order against which no appeal lies under S. 109 (a), Civil P. C. But it is contended on behalf of the applicant that if he is not allowed to appeal he would be precluded from disputing the correctness of the decision of this Court under S. 105 (2), Civil P. C. It has however been held in *Ahmad Husain* v. *Gobind Krishna Narain* (7) and *Venkataranga Rao* v. *Narasimha Rao* (8) that the sub-section does not apply to appeals to His Majesty in Council. Even assuming that this view is not accepted, a person who is aggrieved by an order of remand is precluded under S. 105 (2) from disputing its correctness only if an appeal lies against the order. And if I am right in the conclusion that no appeal lies to the Privy Council under S. 109 (a) on the ground that the decision of the High Court is not a "final order" or a "decree" passed on appeal by the High Court, S. 105 (2) would have no application.

Another ground on which the applicant would not be precluded from disputing the correctness of the decision of this Court on the point of limitation is that the opponent, who has now contended that no appeal lies against the order of the High Court on the ground that it is not a final order, would be prevented by an equitable estoppel from contending before the Privy Council hereafter that the applicant in this case is precluded under S. 105 (2) from disputing the correctness of the decision of this Court on the point of limitation. I think therefore that the application does not lie under S. 109 (a), Civil P. C. The next question is whether the application being treated as an application under S. 109 (c) should be allowed. S. 109 (c) requires that the case must be certified to be a fit one for appeal to His Majesty in Council. These words have been interpreted by their Lordships of the Privy Council in *Banarsi Parshad* v. *Kashi Krishna Narain* (9), where it has been observed that Cl. (c) has been clearly intended to meet special cases; such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. A similar view is also emphasized in *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (10). It is difficult to hold that the point of limitation in this case answers the test laid down by their Lordships of the Privy Council. The application is rejected and the rule is discharged with costs.

Barlee, J.—I agree and have nothing to add.

K.S. *Rule discharged.*

5. (1882) 6 Bom 260.
6. (1884) 8 Bom 548.
7. (1911) 33 All 391=9 I C 932.
8. A I R 1915 Mad 423=21 I C 842=38 Mad 509.
9. (1900) 23 All 227=28 I A 11=7 Sar 825 (P C).
10. A I R 1921 P C 25=60 I C 85=48 I A 31 =44 Mad 293 (P C).

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BAKER AND RANGNEKAR, JJ.

Sundrabai Sitaram and *another*—Appellants.

v.

Manohar Dhondu—Respondent.

Letters Patent Appeal No. 24 of 1931, Decided on 21st November 1932, from order of Nanavati, J., in S. A. No. 588 of 1931.

(a) Bombay District Police Act (1890), S. 33—Police officer purchasing land in name of another—Sale by such benamidar—Suit by son of officer to set aside sale—Contract is wholly void and son cannot enforce claim—Contract Act (1872), S. 23.

A police officer who was forbidden from purchasing land under S. 33, Police Act, purchased land in the name of his mother. After his death, she sold a portion of it to her daughter. The son of the deceased officer sued to have the sale set aside alleging that his father was the true owner of the property.

Held: that the contract under which plaintiff's father obtained the property was void, that no claim can be made on the basis of such illegal agreement and that as the father had no title, the son was not entitled to it: 39 *All.* 51 (*F.B.*), *Dist.* 40 *Bom.* 126, *Ref.*

[P 265 C 1]

(b) Interpretation of Statutes — Act in force on date of transaction — Subsequent repealment of Act does not affect rights or liabilities on date of transaction — General Clauses Act (1897), S. 6 (c).

Where an act is in force on the date of a transaction, subsequent repealment of Act does not affect the merits, rights or liabilities of the parties as on the date of the transaction.

[P 265 C 1]

(c) Benami—Effect should be given to real intent unless the result of so doing would be to violate provisions of Statute — Trusts Act (1882), Ss. 80, 81, and 4.

Where a transaction is once made out to be benami, effect would be given to the real and not to the nominal title, unless the result of doing so would be to violate the provision of a Statute. Where a police officer purchases property benami in the name of another, effect should not be given to his real title as this would defeat the provision of S. 33, Police Act, read with S. 23, Contract Act. [P 265 C 2]

Y. N. Nadkarni and *S. R. Parulekar* —for Appellants.

T. N. Walawalkar — for Respondent.

Rangnekar, J.—This appeal arises out of a suit brought by the plaintiff for setting aside a sale, dated 22nd April 1925, executed by his grandmother in favour of the defendant and for possession of such part of the property as may be found in her possession. The defendant is the sister of the plaintiff's father, and she defended the suit on the ground that the property, the subject-matter of the sale deed, belonged to her mother who had sold it to her. According to the plaintiff, the property was purchased by his father benami in the name of his mother, i. e., the plaintiff's grandmother, in 1901, as he was a Government servant. It appears that the plaintiff's father was a police constable, and whilst in service he purchased this property benami in the name of his mother. This was denied by the defendant, who contended that the property belonged to the mother and was purchased by her with her own moneys. The trial Court found that the property was purchased by the plaintiff's father benami in the name of the mother, and this finding was accepted by the learned appellate Judge. In appeal however the defendant raised a contention that the transaction of the purchase by the plaintiff's father and the contract on which it was founded were void by reason of the provisions of S. 33, Bombay District Police Act, 4 of 1890. This contention was negatived by the appellate Court, relying on *Bhagwan Dei* v. *Murari Lal* (1). It may be pointed out however that in the Allahabad case the transaction was prohibited by one of the Government Servants' Conduct Rules, and not, as here, by Statute. The distinction between the two classes of cases is obvious and is pointed out in many decisions. I need refer to a decision of Sir Basil Scott in *Ramkrishna Trimbak* v. *Narayan* (2), and also to the remarks of the Allahabad High Court itself in the same volume at pp. 60 and 61. The question therefore is whether the lower Court's decision is right. S. 33, Bombay District Police Act, before it was repealed by Bombay Act, 24 of 1930, ran as follows:

"33. (1) No police officer shall engage in trade or be in any way concerned either as principal or agent, in the purchase or sale of land within the district wherein he is employed or in any commercial transaction whatever, without the permission of the Magistrate of the district or of Government."

The law on the subject is somewhat complex, but we think the principle is well put by Parke, B., in *Cope* v. *Rowlands* (3), a case which is often followed and referred to with approval by eminent Judges in England, in these words at p. 157:

"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or Statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the Statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, *Bartlett* v. *Vinor* (4). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the Statute means to prohibit the contract?"

In *Langton* v. *Hughes* (5), Lord Ellenborough, C.J., said (p. 596):

"...it may be taken as a received rule of law that what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action."

Dealing with the same point in *Anderson Ld.* v. *Daniel* (6) Bankes, L. J., quotes with approval a passage of Buckley, J., in *Victorian Daylesford Syndicate Ltd.* v. *Dott* (7) which runs as follows (p. 629):

"The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that

1. (1917) 39 All 51=36 I C 259 (F B).
2. (1916) 40 Bom 126=31 I C 301.
3. (1836) 2 M & W 149 = 2 Gale 231 = 6 L J Ex 63.
4. Carthew 252.
5. (1813) 1 M & S 593.
6. (1924) 1 K B 138=93 L J K B 97=130 L T 418 = 88 J P 53 = 40 T L R 61 = 22 L G R 49.
7. (1905) 2 Ch 624=74 L J Ch 673=21 T L R 742=54 W R 231=93 L T 627.

a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose Statutes may be grouped under two heads : those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented upon in numerous cases, including those which have been cited of *Cope* v. *Rowlands* (3), and *Fergusson* v. *Norman* (8)."

I have referred to S. 33 of the Act. I will now refer to S. 23, Contract Act. Reading these two sections together, in my opinion, the contract under which the plaintiff's father obtained the property was void as it was prohibited by the Bombay District Police Act.

But it is argued that the prohibition in S. 33, Bombay District Police Act, was not absolute, but only conditional, inasmuch as it was competent to a police officer to purchase property subject to a condition that he obtained the permission of the District Magistrate or the Government, and that therefore the prohibition was qualified. It was further stated that the section occurs in a chapter dealing with the discipline of the force and that no penalty was imposed by the statute for the breach of the rule contained in the section. As I have pointed out, the object of the legislature in enacting a rule is irrelevant in such cases, and therefore the fact that the rule in this section was enacted in the interests of discipline, or, as I am inclined to think, in the interests of public service and public good, does not matter. I do not however agree that no penalty was enforced by the Statute. In my opinion S. 36 (2) (c) clearly imposes a penalty on the police officer guilty of any wilful breach or neglect of any provision of the law. Apart from that it is clear on the authorities that if the act be prohibited without any express penalty, it cannot be the subject of a valid contract. In *Anderson, Ltd.* v. *Daniel* (6), referred to above, which was a case under the Fertilisers and Feeding Stuffs Act, 1906, (6 *Edw.* 7, c. 27), and which provided every person selling for use as a fertiliser of the soil any article which had been subjected to any artificial process in the United Kingdom or which had been imported from abroad to give to the purchaser an invoice stating what were the respective percentages of certain chemical substances contained in that article, and in default certain penalty was prescribed, it was held that as the object of the Statute in requiring the vendor to give the statutory invoice and imposing on him a penalty in the event of his default was to protect the purchasers of fertilisers, the effect of non-compliance with the requirement was not merely to render the vendor liable to penalty, but also to make the sale illegal and preclude him from suing for the price.

In many statutes relating to professions or trade restrictions and regulations affecting the contracts are imposed as to the qualification as to the conduct in business and the validity of contracts, etc., and the law is that if the qualification is not observed or the condition fulfilled, the contract would be illegal. Take for instance S. 20, Companies Act, which requires more than 20 persons forming a company to get it registered, and if a company or a partnership entered into in breach of the conditions laid down in that section, it has been held, and there can be no doubt that the partnership or the company would be illegal. The case of *Anderson, Ld.* v. *Daniel* (6) lays down the same principle. By the Medical Act, 1858, S. 32:

"No person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, . . . etc., unless he shall prove . . . that he is registered under this Act."

And it has been held that if this condition is not satisfied, he is not entitled to recover any charge: see *Leman* v. *Houseley* (9). There are many instances of the application of this principle under the English Money-lenders Act, which prescribes certain conditions on a person doing the money-lending business, the principal among them being that he must register himself as a money-lender in accordance with the regulations of the Act. Thus, in *Whiteman* v. *Sadler* (10), Lord Macnaghten observed (p. 521):

"If, in violation of the plain words of the Act, a money-lender trades without being registered at all, or being registered trades in another name, he is very properly left to the mercy of anyone

8. (1838) 5 Bing N C 76=6 Scott 794 = 1 Arn 418=8 L J C P 3=3 Jur 10.

9. (1874) 44 L J Q B 22=10 Q B 66=31 L T 833=23 W R 235.

10. (1910) A C 514=79 L J K B 1050=26 T L R 655=54 S J 718=103 L T 296.

who chooses to attack him, and his contracts are rightly avoided."

It is not necessary to multiply instances which will be found in the English reported decisions. The effect of illegality in the matter or purpose of an agreement is to render it wholly void of legal effect, and no claim or defence can be maintained which requires to be supported by allegations or proof of illegal agreement. As Mansfield, C. J., put it in *Holman* v. *Johnson* (11) the principle is as follows (p. 343):

"The objection, that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake however that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff . . . If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted."

If then the contract was void the plaintiff's father got no title. If so, it is difficult to see how the plaintiff who claims through him can establish any title to the property acquired by his father under these circumstances. It is clear that if the plaintiff's father had to bring a suit to recover possession of the property against the vendor, or the vendor had to bring a suit to recover the price of the property against the plaintiff's father, neither party would have been allowed to set up the contract, and the Court would have refused its aid to them. In my opinion, the plaintiff is in no better position than his father. It is argued by Mr. Walavalkar that the section having been repealed in 1930 when this litigation had been pending and had not been concluded his client is not affected by the prohibition contained in S. 33, Bombay District Police Act. The answer to that is that the section was in force when the transaction was effected and any subsequent repeal of the section would not affect the merits, rights or liabilities of the parties as on the date of the transaction. I may refer in this connexion to S. 6 (c), General Clauses Act, 1897, which runs as follows:

"(6) Where this Act, or any Act of the Governor-General in Council or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or."

Mr. Walavalkar has referred to some old English decisions in support of his contention, but I do not think they are applicable. Even in England the principle as to a subsequent repeal of a Statute is the same as is laid down in our General Clauses Act. Thus the Interpretation Act, 1889, 52 & 53 Vic. c. 63, S. 38 (2), says:

"Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed;

(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed;"

There is another way of looking at the case. This was a benami transaction. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami, and the person in whose name the transaction is effected is called benamidar. On the facts found in this case the transaction was benami, and the plaintiff's grandmother was benamidar. The law is that where a transaction is once made out to be benami, effect would be given to the real and not to the nominal title, unless the result of doing so would be to violate the provision of a Statute. This follows from the provisions of Ss. 80, 81 and S. 4, Trusts Act, and on the facts, to give effect to the transaction, and to hold that the plaintiff's title was established, would result in defeating the provisions of S. 33, Bombay District Police Act, read with S. 23, Contract Act. The result is that the appeal must be allowed and the decree reversed; but considering the circumstances of this case, and in particular the fact that this contention was not raised in the original Court, but was raised for the first time in appeal, we think each party should bear his own costs throughout.

K.S.

Appeal allowed.

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11. (1775) 1 Cowp 341.

* A. I. R. 1933 Bombay 266

MURPHY AND BROOMFIELD, JJ.

Mazarali Inayatali Kureshi—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 374 of 1932, Decided on 19th January 1933, against order of Asst. Sess. Judge, Poona.

(a) Criminal P. C. (1898), S. 239 (d)—"Same transaction"—Meaning—Two police officers having sexual intercourse with defenceless woman in police station one after another—Joint trial is not illegal.

A precise definition for the expression "the same transaction" cannot be formulated and each case must depend on its own facts. It is for the Court, to decide whether in each case there is sufficient continuity of purpose between the acts of the jointly tried accused, to justify it in finding that the transaction was in reality a single one though composed of separate acts by the different accused. [P 268 C 2]

The two accused finding themselves alone in the police station went in succession and raped the complainant who was staying there.

Held: that the separate acts of rape of the accused formed part of a single transaction as they could not have been committed severally unless they had either been tacitly agreed to or reciprocally connived at by each of the accused in his turn and that the joint trial was not illegal: 15 *Bom* 491; 29 *Bom* 449; *A I R* 1927 *Mad* 177 and *A I R* 1929 *Bom* 296, *Dist*; 30 *Bom* 49; *A I R* 1927 *Bom* 177; *A I R* 1926 *All* 334 and *A I R* 1929 *Bom* 128, *Ref*. [P 268 C 1]

***(b) Criminal P. C. (1898), S. 162—Statements made by complainant to police before commencement of investigation do not come under S. 162.**

A girl who was raped by two constables made statements to other constables about the acts of the accused. The Sub-Inspector then came and recorded the statement of the girl and started investigation. The Deputy Superintendent came subsequently and in his turn questioned the girl. All these police men gave evidence of the statements made to them.

Held : that the statements made to the policemen before recording of the statement by the Sub-Inspector were admissible as they were made before investigation began and as they did not come under S. 162 but that the statement of the Deputy Superintendent was inadmissible as it was made subsequent to it.

Held also : that as there was clearly much other and stronger evidence in the case against the accused the High Court need not interfere in view of S. 167, Evidence Act. [P 269 C 1; P 270 C 1]

(c) Criminal P. C. (1898), S. 162 — Oral statements made to police during investigation are not admissible except under S. 162.

Even oral statements made to police during investigation cannot be admitted and their admission is confined to the provisions of S. 162, that is for contradicting witnesses on behalf of defence: *A I R* 1925 *Mad* 579, *held* **Overruled;** *A I R* 1924 *Bom* 510, *Foll.* [P 269 C 2]

G. C. O'Gorman and *J. G. Rele*—for Accused.

P. B. Shingne—for the Crown.

Murphy, J.—This is an application to revise the order of the learned Sessions Judge of Poona dismissing the applicant's appeal from the decisions of the Assistant Sessions Judge of Poona. The applicant and a second offender were tried by the Assistant Sessions Judge of Poona with the aid of a jury on a charge under S. 376, I. P. C. The jury's verdict was unanimous, and, in accordance with it, the accused were convicted of the offence with which they had been tried and sentenced to four years' rigorous imprisonment. The facts which were alleged against the accused were that a woman named Chandrabhaga, who seems to have abandoned her husband and thereafter for some time to have lived a wandering life, probably with prostitutes, complained to the Head Constable in charge of the police station at Ghodnadi that she had been abducted and raped by a certain person. Her complaint was recorded and an investigation into it was begun by the Head Constable and was ultimately taken up by the Sub-Inspector of the Police Station, on his return to his headquarters. Chandrabhaga was a young girl and had no home to go to, and she was consequently permitted to stay in the Sub-Inspector's Office at the Police Station. Nothing is alleged to have occurred there on the first night of her stay. On the second, it was said that, towards the middle of the night, after the office had been more or less closed and while Chandrabhaga was there, there being in the office at the same time, the two accused and the guest of accused 1, the accused each in turn went over to where Chandrabhaga was sleeping and raped her. This is the charge on which the two accused were convicted.

Two points have been raised in this application. The first is that the joint trial was irregular, the rape by each of the accused being isolated acts not forming a single transaction, and, secondly, that inadmissible evidence has been admitted in the shape of statements to police officers made in the course of the investigation, the admission of which is prohibited by S. 162, Criminal P. C., and that the jury were so misdirected by the learned Assistant Sessions Judge, who invited them to consider these inadmissible pieces of evidence. We have consequently been asked to interfere with the

judgment and sentence in revision. Mr. O'Gorman's first point is the question of the illegality of the trial. The law relating to joint trials is to be found in S. 239, Criminal P. C., which is to the following effect:

"The following persons may be charged and tried together, namely: (a) persons accused of the same offence committed in the course of the same transaction; (b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence; (c), persons accused of more than one offence of the same kind within the meaning of S. 234 committed by them jointly within the period of 12 months; and (d) persons accused of different offences committed in the course of the same transaction; . . . ."

With the remainder of the section we are not now concerned. The facts here are covered by the section falling within sub-Cl. (d), i. e.

"persons accused of different offences committed in the course of the same transaction,"

and the real point for decision is whether it can be said that these two independent acts of each of the accused were committed in the course of what may be called "the same transaction." There is an obvious difficulty in defining this expression as used in S. 239, and in one of the cases to which we have been referred, Crump, J., has remarked that the legislature has perhaps been wise in refraining from an attempt to do so. The cases relied on by Mr. O'Gorman for the applicant are to be found in *Queen-Empress* v. *Fakirappa* (1), *Emperor* v. *Jethalal* (2), *Samiullah Sahib* v. *Emperor* (3) and *Emperor* v. *Ring* (4). The facts all differ and obviously the finding on the question of whether a particular state of facts is a single, or more than one, transaction, must depend on those in each case. The first case I have quoted was where the accused, it was held, had all been concerned in a police investigation into a case of theft. The second one *Emperor* v. *Jethalal* (2), was concerned with a question of whether persons, who had received different portions of property which had been stolen in different times, could be tried together. That reported in *Samiullah Sahib* v. *Emperor* (3) was an instance of independent poachers all fishing at the same spot and accused of theft, and *Emperor* v. *Ring* (4) was that of certain police officers, who formed a conspiracy to receive bribes from the complainant and the accused in a certain matter, there being a conspiracy on the part of the complainants to bring a false case against the accused, and a similar one on the part of the accused to produce false evidence in their defence, all the parties to these various conspiracies having been tried at one trial and the joint trial there being held to be regular.

As against these authorities the learned Government Pleader has relied especially on the cases of *Emperor* v. *Datto Hanmant* (5), *Emperor* v. *Sejmal Poonamchand* (6), *Emperor* v. *Rafi-uz-Zaman Khan* (7) and *Emperor* v. *Gopal Raghunath* (8), where *Emperor* v. *Datto Hanmant* (5), was followed. The first of these involved a question of whether the Karbhari of the Chafal Mahant, who was tried along with the cashier of that foundation, had been properly tried at the same trial with his co-accused for misappropriating the trust funds, and it was held that the trial had been regular as each of the accused there would have been unable to act separately and without the other's connivance, though the acts of misappropriation alleged against them were separate in each case. The facts in the Allahabad case related to some communal riots. Three witnesses (Mahomedans) gave false accounts as to how a Mahomedan had been killed by Hindus, and the identity of purpose running through the three different false depositions was held to be a sufficient ground to justify their joint trial. The case in *Emperor* v. *Sejmal Poonamchand* (6) was very similar, the false evidence in that matter having been given to further the same claim, and it was held that there was sufficient continuity of time and space in their actions to justify the joint trial. Marten, J., in *Emperor* v. *Madhav Laxman* (9), remarked that a wide meaning ought to be given to

1. (1890) 15 Bom 491.
2. (1905) 29 Bom 449=7 Bom L R 527=2 Cr L J 480.
3. A I R 1927 Mad 177=98 I C 597=27 Cr L J 1381=50 Mad 735.
4. A I R 1929 Bom 296=1929 Cr C 114=120 I C 340=31 Cr L J 65=53 Bom 479.
5. (1905) 30 Bom 49=2 Cr L J 578=7 Bom L R 633.
6. A I R 1927 Bom 177=100 I C 981=28 Cr L J 373=51 Bom 310.
7. A I R 1926 All 334=93 I C 237=27 Cr L J 445=48 All 325.
8. A I R 1929 Bom 128=116 I C 243=30 Cr L J 588=53 Bom 344.
9. A I R 1918 Bom 117=48 I C 871=20 Cr L J 71=43 Bom 147.

the words "the same transaction" which have been used in the section. The case in *Emperor* v. *Gopal Raghunath* (8), followed the ruling laid down in *Emperor* v. *Datta Hanmant* (5). There are remarks throughout the judgments in these cases to the effect that in fact a precise definition for the expression "the same transaction" cannot be formulated and that each case must depend on its own facts. It is for the Court, in other words, to decide whether in each case there is sufficient continuity of purpose between the acts of the jointly tried accused, to justify it in finding that the transaction was in reality a single one though composed of separate acts by the different accused.

The facts alleged here, as has been already briefly stated, are that the accused, finding themselves alone in the Sub-Inspector's office at Ghodnadi at night, the fourth person present being asleep at the time, went in succession and raped the girl Chandrabhaga, and the argument has been that, rape being essentially an individual act, it cannot be said, in the absence of a charge of abetment in the proceedings, that the two separate rapes were a single transaction. There seems to us however to be a difficulty about holding that these separate acts do not form part of a single transaction. It is obvious in the circumstances that the separate acts of rape alleged could not have been severally committed unless they had been either tacitly agreed to or reciprocally connived at by each of the accused in his turn. It seems to us, on these facts, that, even in the absence of any evidence of an act of abetment on the part of each accused by the other, there was either a tacit agreement between them ; or, an acquiescence on the part of each in what the other did, which was an understanding that there would be no interference on the part of either of them against the other, if a similar degree of acquiescence was exercised, by the other in his turn. Though for different reasons therefore we think in fact that the learned Sessions Judge, as also the trial Judge, before whom the objection was taken at the earliest moment, were right in finding that the transaction was essentially single, and that the joint trial was proper in the circumstances of the case.

The second point arises in the following manner : As already related, the offence was one committed within the precincts of the police station, and one in which only policemen were concerned, both as accused and as witnesses, apart from the victim. It appears that two other policemen stationed there noticed that the light in the police office, which presumably is kept alight all night, had been put out and that there were suspicious sounds coming from the room. These men, called Dandawate and Shankar, thereupon went and reported their suspicion to the Head Constable named Pathan, and these three policemen then came to the office. They entered and lighted the lamp and found Chandrabhaga in a corner of the room, and on their arrival she at once complained of the two accused's acts and of the pain which had been caused her. The Head Constable then went and called the Sub-Inspector, who was sleeping in the police station at the time, and he, coming there, recorded the statement of the girl Chandrabhaga and started an investigation which ended in the prosecution in this case. Later, the same morning, the Deputy Superintendent of Police was sent for, and he also in his turn questioned Chandrabhaga and inquired into the circumstances of the case. All these policemen were examined at the accused's trial, and they gave evidence as to her complaining against the accused and her account of the events of that night. Their statements on this point were very clearly put to the jury by the learned Assistant Judge in his summing-up. Mr. O'Gorman's complaint as to this was that all these statements were inadmissible under S. 162, Criminal P. C., and therefore that inadmissible evidence had been allowed to be taken and had been put to the jury as material on which they should form their conclusion, and that the jury had consequently been prejudiced and the trial vitiated by the improper admission of irrelevant evidence and a misdirection on this point.

The provisions of the Criminal Procedure Code relating to investigations begin at S. 154. That section requires that every information relating to the commission of a cognizable offence, if given orally, to an officer in charge of a police station, shall be reduced to writing by him, or under his direction and be

read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf. The subsequent procedure is under Ss. 156 and 157, which require that a copy of the information should be sent to the Magistrate empowered to take cognizance of such offence. Then S. 162 is to the following effect:

"No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. . . . ."

The manner of its use is thereafter provided, that is, it may be used with the permission of the Court to contradict a witness for the purpose of the defence. It will be noticed that the prohibition is against a statement made in the course of an investigation under this chapter. A police investigation begins with the proceedings taken under S. 154, that is the recording of the complaint, and the power to record such a complaint rests in an officer in charge of a police station. On the facts here, constables Dandawate, Shanker and Pathan were not officers in charge of a police station and had no power at the time to begin an investigation. This was begun by the Sub-Inspector on his arrival, and the statement of the complainant that he took is the complaint in the case. The first three statements by the complainant having been made not in the course of an investigation, but before it, it seems to us that as regards these three police officers, the evidence that they gave does not come within the prohibition of S. 162. The fourth person to whom she made a statement was the Sub-Inspector, and that statement being the complaint is clearly admissible. Later however the Deputy Superintendent of Police came and recorded, or rather verified, her statement. He has endorsed on the complaint that it had been read over to the complainant and that she had stated that it was correct and he added some answers to questions which he thereupon put to her. As to this statement we think that it was in fact inadmissible. The officer might have been allowed to say that he had questioned the complainant, but what she had stated was barred by S. 162, and so far this piece of inadmissible evidence has been admitted against the accused and has been referred to in the learned Judge's charge to the jury.

Mr. Shingne has argued that oral statements as distinguished from written ones are admissible for certain purposes and relied in the first instance on the Madras case of *Venkatasubbiah* v. *Emperor* (10), but this has been overruled by a Full Bench of that Court, and in any event a Bench of this Court has decided in the case of *Emperor* v. *Vithu Balu* (11) that no such use can be made of police statements and that their admission is confined to the provisions of S. 162, that is for contradicting a prosecution witness on behalf of the defence. Our findings on this matter therefore are that as regards the evidence of Dandawate, Shanker and Pathan what they said was admissible and was correctly put to the jury; but that the repetition of the statement of the complainant to the Deputy Superintendent of Police was inadmissible and should not have been put to the jury. We have therefore to consider whether this fact is such as to cause us to interfere with the trial in view of S. 167, Evidence Act. That section provides that the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence has been received, it ought not to have varied the decision. In this case there was a good deal of evidence, apart from that of the Deputy Superintendent of Police, who in fact only verified the complaint, to justify the verdict to which the jury had come to. Although it is not possible to say with absolute certainty that any speci-

10. A I R 1925 Mad 579=85 I C 209=26 Cr L J 721=48 Mad 640.
11. A I R 1924 Bom 510=83 I C 1007=26 Cr L J 223.

fic piece of evidence may not have influenced one or more members of the jury, yet, in view of the facts and the Judge's charge which, apart from this one flaw, was admittedly a fair one, we think that the admission of the evidence, which has been rejected by us, and the reference to it in the learned Judge's charge, are not facts which, in view of S. 167, Evidence Act, would justify us in interfering with the decision. There was clearly much other and stronger evidence in the case against the accused. The rule will therefore be discharged.

Broomfield, J.—I agree and have very little to add. It was pointed out in *Emperor* v. *Madhav Laxman* (9), and it has been pointed out in many other cases, that a wide meaning has to be given to the words "the same transaction" in S. 239, Criminal P. C., and that each case must be decided on its own facts. A definition of the words has been attempted in several cases which have been cited by my learned brother. The gist of these decisions may, I think, be said to be that there must be a common intention or purpose and continuity of action. Mr. O'Gorman who appears for the applicant has argued that in this case there was no common purpose and that his client and the police constable who is accused 2 in the case acted quite independently in what they did. With this however I cannot agree. The two accused were associated together in their daily intercourse. The applicant was a head constable, the other accused his subordinate, and under the circumstances in which this crime has been held to have been committed some degree of concert between the two accused may, I think, be fairly assumed. It would hardly be possible that they could have raped this woman one after the other, as they did, without some sort of tacit conspiracy. Each of them may reasonably be said to have encouraged or connived at the act of the other. They had the same object, viz., taking advantage of a defenceless woman, and they did it as nearly simultaneously as physical considerations permitted. There was obviously proximity of time and space. Mr. O'Gorman drew our attention to the fact that the accused were not charged with abetment. But it was pointed out by Fawcett, J., in *Emperor* v. *Sejmal Poonamchand* (6) that abetment may be a connecting link sufficient to include the acts of different persons in the same transaction, although abetment has not been made part of the charge. I think therefore that there has been no misjoinder in this case and accused were legally tried together.

As to the alleged admission of irrelevant statements to the police, I agree with my learned brother that the only statement that can be said to be barred by S. 162, Criminal P. C., is the one made to the Deputy Superintendent of Police, after the investigation had commenced with the recording of Chandrabhaga's complaint under S. 154 of the Code. But this was very little more than a verification of the complaint itself, and, though the Judge was wrong in referring to the statement at all, I cannot believe that this error on his part really affected the decision of the case in the least. For these reasons I agree with my learned brother that the rule should be discharged.

K.S. *Rule discharged.*

A. I. R. 1933 Bombay 270

PATKAR AND BARLEE, JJ.

Ebrahim Haji Jusab—Appellant.

v.

Jainibi Anuddin—Respondent.

First Appeal No. 161 of 1932, Decided on 12th December 1932, from decision of J. F. Gennings, Commissioner of Workmen's Compensation, Bombay, in Appln. No. 105-B10 of 1932.

Workmen's Compensation Act (1923), S. 2 (1) (n)—"Workmen" — Employment of casual nature—Onus is on employer — High Court will interfere only if Commissioner is wrong in statement of law and its application.

The question whether an employment is of a casual nature is one of evidence. The onus in such cases would be on the employer to prove the condition which is necessary for the purpose of excluding a person from the category of a workman, and it has to be shown that the workman's employment was of a casual nature.

The High Court will interfere with the decision of the Commissioner only if the statement of law by him or its application to the facts is obviously wrong: *Knight* v. *Bucknill*, (1913) 6 *B W C C* 160; *Smith* v. *Buxton*, (1915) 8 *B W C C* 196 and *Hughes* v. *Walker*, (1926) 19 *B W C C* 79, *Ref.* [P 271 C 2; P 272 C 1]

Y. N. Nadkarni, *G. A. Subnis* and *S. K. Ambedkar*—for Appellant.

S. C. Joshi and *B. G. Modak*—for Respondent.

Patkar, J.—In this case the applicant claimed compensation for the death of her son Yasin Anuddin, who was employed by the appellant owning property at Parel, and who fell from the scaffolding while executing repairs to his building. The Commissioner found that the workman's employment was not of a casual nature, but on the contrary he was regularly employed for an appreciable period of time by the same employer. It is contended on behalf of the appellant that the employment of the deceased was of a casual nature. "Workman" is defined in the Workmen's Compensation Act 8 of 1923, S. 2 (1) (n), as follows:

"'Workman' means any persons (other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business) who is employed, either by way of manual labour or on monthly wages not exceeding three hundred rupees, in any such capacity as is specified in Sch. 2."

Under S. 2, Cl. (vi), any person who is employed in the construction, repair or demolition of a building which is designed to be, is, or has been more than one storey in height above ground level is a workman within the meaning of S. 2 (1) (n) subject to the provisions of that section. The building on which the deceased was employed was more than one storey in height above ground level. The question therefore in this appeal is whether he falls within the two exceptions mentioned in the definition, namely, where the employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business. Two conditions are required to exclude a person from the category of a workman. If any of these conditions is not satisfied, he is a workman within S. 2, Cl. (1) (n). It is necessary to decide whether the employment of the deceased in this case was of a casual nature. Several cases were cited before us which interpreted the phrase "of a casual nature" by contrasting it with its opposites regular, periodical or permanent. In *Knight* v. *Bucknill* (1) it was observed by Hamilton, L. J., as follows (p. 164):

"It would appear to infer something midway between the regular employment of a workman and a simple engagement for a single day, and I think that casual is here used not as a term of precision, but as a colloquial term."

He further observed:

"... It may be inferred that when the state of facts is midway between these two states, so that the question is reasonably debatable, it must be for the County Court Judge to decide."

The same view was accepted in *Smith* v. *Buxton* (2). In *Hughes* v. *Walkar* (3) it was observed as follows (p 83):

"In the course of the many cases which have been decided it appears that the Courts have leant more generally to saying that the question of what is casual labour is a matter of fact to be determined by the County Court."

It was further observed as follows (p. 85):

"In the present case it appears to me that there was evidence before the County Court Judge which would justify him in holding that a man employed to build a wall at a rate of wages, whether determined by the hour, by the week or by the day I care not, but employed to build a wall, might well be found to be engaged in an employment that was not of a casual nature."

The Commissioner in this case observed in the course of his judgment:

"It seems to me impossible to argue that his employment was of a casual nature. If it were so held, the majority of workmen in the building trade might never get any compensation at all because it is well known that they go from job to job and from employer to employer."

That appears to us not to be a conclusive test. The question in each case is whether on the evidence the employment is of a casual nature. The onus in such cases would be on the employer to prove the condition which is necessary for the purpose of excluding a person from the category of a workman, and it has to be shown that the workman's employment was of a casual nature. It appears from the evidence in this case that the job of repairing the building was entrusted to five or six persons for a period which was expected to take more than 20 days, and five or six labourers were employed. They were not paid by the day, though the payment by the day is not conclusive in such cases. There appears to be a regular employment of five or six workmen for a particular job and there is evidence in this case on which the Commissioner could base his finding that the deceased was regularly employed and that the deceased's employment was not of a casual nature. We think therefore it is difficult to interfere with the finding of fact of the lower Court on this point. If the finding is accepted, it is not necessary to go into

1. (1913) 6 B W C C 160.

2. (1915) 8 B W C C 196.

3. (1926) 19 B W C C 79.

the other question as to whether he was employed otherwise than for the purposes of the employer's trade or business, because if one condition fails, there is no exclusion of the deceased from the category of "workman." The appeal therefore fails, and must be dismissed with costs.

Barlee, J. — I agree. The English cases show that the Judges of the Court of appeal have hesitated to commit themselves to a definition of the word "casual." Certain forms of employment clearly are casual. Others are not so, and there is a wide territory between in which no definite boundary line can be drawn. In the case of *Knight* v. *Bucknill* (1) Hamilton, L. J., said (p. 164):

"It (the word casual) would appear to infer something midway between the regular employment of a workman and a simple engagement for a single day, and I think that casual is here used not as a term of precision, but as a colloquial term."

Then, is the employment of a man for a job which is likely to last for 30 days a casual employment or not? That was the question which the learned Commissioner had to decide, and he has decided it in the negative, and we can only interfere with him if we consider that his decision is wrong in law. His statement of the law cannot be said to be incorrect, and his application of the law to the facts of this case is not obviously wrong. I say this without expressing any opinion of my own, for it is not for this Court to express an opinion on the facts. We can only interfere with the decision of the learned Commissioner if either his statement of the law is wrong or his application of the law to the facts is obviously wrong. In these circumstances I agree that the appeal must fail.

K.S. *Appeal dismissed.*

* A. I. R. 1933 Bombay 272

BAKER AND RANGNEKAR, JJ.

Shidramappa Nilappa Ujalambe — Appellant.

v.

Neelavabai Chanbasappa and *others* —Respondents.

First Appeal No. 14 of 1927, Decided on 18th November 1932, from decision of First Class Sub-Judge, Sholapur, in C. A. No. 2415 of 1924.

* **(a) Hindu Law of Inheritance (Amended Act 2 of 1929), S. 2 — Position of sister in Bombay is not affected by the Act.**

The Act contemplates the succession after the father's father and leaves the law as to the order of succession before father's father undisturbed. Where, there as in Bombay since 1867 sister is assigned a special place and taken before father's father, it cannot be contended that the legislature intended to degrade her, to take away from her superior and vested rights she had and to allow other heirs to supersede her. In Bombay therefore the sister is the preferential heir to the brother's widow. [P 273 C 1, 2]

(b) Interpretation of Statutes — Purpose of the Act should be looked to.

In construing a Statute it is permissible to look for the purposes of enactment the mischief or defect to be prevented, the remedy and the reason of the remedy which the legislature intended to apply should be looked for. [P 274 C 1]

(c) Interpretation of Statutes—Proceedings in Council are not to be looked into.

Proceedings in Council whilst a Statute is being enacted are not relevant and cannot be looked at by the Court on the question of construction of the Act : 22 *Cal* 783, *Foll.* [P 275 C 1]

W. B. Pradhan and *P. S. Bakhale*—for Appellant.

G. S. Mulgaonkar and *K. N. Dharap* —for Respondents.

Baker, J. — A preliminary question arises in this appeal as to who is the heir of respondent 1, Bhagirthibai, the original plaintiff. The contest is between Neelava, respondent 4, who is the widow of Chanbasappa, the separated brother of Bhagirthibai's husband Shivlingappa, and Shivlingappa's three sisters: Akavva, Sangava, and Kushava. The point is of importance as Neelava supports the appellant, and therefore if she is found to be the heir of Bhagirathibai there is not likely to be much opposition to the appeal. It is settled law in the Bombay Presidency that the sister inherits immediately after the father's mother and before the father's father under the Mitakshara. But it is contended that her place in the order of succession is affected by Act 2 of 1929, Hindu Law of Inheritance (Amendment) Act, S. 2, which provides that a son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother. If therefore this Act is literally interpreted the effect is to place the sister in a lower position than that which she at present occupies in the Bombay Presidency where she succeeds before the father's

father and before the brother's widow as laid down in *Rudrapa* v. *Irawal* (1). There are two views possible, one : that in view of the words of the Act the sister must rank in the order of succession after a father's father, and the other, which is the view adopted by Sir Dinshah Mulla in his Hindu Law, is that her place in the order of succession is not affected by the Act, for the Act contemplates succession after the father's father while her place as determined by a series of decisions since 1865 is immediately after the father's mother. Under S. 3 of the Act it is provided that nothing in this Act shall affect any special family or local custom having the force of law. It is argued that the position of the sister in Bombay depends not on any special local custom but on the interpretation of the texts by this High Court in a series of decisions.

The object of the Act was to legalise the position of certain heirs including the sister and it was not intended to change for the worse the position which the sister holds in the Bombay Presidency. This is perhaps not so clear from the Act, as it might be, although it says in para. 3 (a)

"Nothing in this Act shall affect any special family or local custom having the force of law."

If therefore the position of the sister in the Bombay Presidency is regarded as depending on local custom, it would not be affected by the Act. The view taken by Sir Dinshah Mulla in his Hindu Law, Edn. 7, p. 40, is that the place of the sister in the order of succession is not affected by the Act, for the Act contemplates succession after the father's father, while the sister's place as determined by a series of decisions since 1865 is immediately after the father's mother :

"In cases governed by the Mitakshara, this appears to be the only way of supporting the old order of succession. It cannot be saved on the ground of custom, for otherwise a sister in the Madras Presidency should still rank as a bandhu on the ground of custom, she having been recognized as such in that Presidency for upwards of half a century. This difficulty cannot arise in places where the Mayukha is the overruling authority, such as Gujrat, the island of Bombay and North Konkan, for the Act applies only to cases 'subject to the law of the Mitakshara.'"

It would therefore in view of the opinion of Sir Dinshah Mulla, which, though not binding on us, is entitled to great respect, be unsafe to exempt the sister in Bombay from the operation of Act 2 of 1929, on the ground of custom, but apart from this, in view of the fact that the Act, if literally interpreted, while designed to improve the position of the sister, has actually the contrary effect in Bombay, I would adopt the view that the Act was not intended to affect the position of the sister in Bombay, and this being so the sister is the preferential heir to the brother's widow. Therefore the sisters Akavva, Sangava and Kushava are the heirs of the deceased and their names should be added on the record in her place.

Rangnekar, J.—This appeal raises an important preliminary question under Act 2 of 1929 entitled the Hindu Law of Inheritance (Amendment) Act, 1929. Respondent 1, Bhagirthibai, succeeded in getting a decree in the trial Court for possession of a house belonging to her deceased husband Shivlingappa. Defendant 4 has appealed from the decree. Pending the appeal respondent 1 died. Thereupon the appellant amended the record by bringing Neelava, original defendant 3, who is a widow of a half-brother of Shivlingappa, and three sisters of Shivlingappa as heirs and legal representatives of Bhagirthibai on record. Mr. Mulgaonkar, who appears for the sisters, contends that as between Neelava and his clients, his clients are preferential heirs under the Hindu law prevailing in the Bombay Presidency, as Neelava comes in as an heir, only as the widow of gotraja sapinda. The question thus raised has to be determined by this Court under the provisions of O. 22, R. 5. The question shortly is, whether as between a sister of the propositus and his brother's widow, who is the preferential heir ? But for Act 2 of 1929 the question in Bombay could have admitted of only one answer and it is clear on the authorities that the sister would succeed before the widow of a gotraja sapinda. Mr. Dharap however, who appears for Neelava, says that the order of succession prevailing hitherto is altered by this Act. The Act applies only to cases "subject to the law of Mitakshara." The relevant sections are Ss. 2 and 3, which run as follows :

"2. A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so

1. (1903) 28 Bom 82=5 Bom L R 676.

specified, be entitled to rank in the order of succession next after a father's father and before father's brother."

Then comes the proviso under S. 3, and Cl. (c) of it runs as follows:

"Nothing in this Act shall—(c) enable more than one of several persons (son's daughters, daughters' daughters, sisters or sister's sons) to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir."

Mr. Dharap says that under the Act the sister is postponed to a widow of the gotraja sapinda. He says that the heirs mentioned in S. 3 of that Act come in only after the father's father and therefore the position of the heirs before father's father in the order of succession is left untouched. That being the case he argues that the widow of the brother comes before father's father in Bombay, and therefore a fortiori must be preferred to the specified heirs mentioned in S. 2. The question is whether on a proper construction of the Act the sister comes after the widow of gotraja sapinda. In construing a statute it is permissible to look for the purposes of enactment the mischief or defect to be prevented, the remedy and the reason of the remedy which the legislature intended to apply should be looked for. In *Heydon's* case (2) it was unanimously resolved by Sir Roger Manwood, Chief Baron, and the other Barons of the Exchequer (p. 7b)

"that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1) What was the common law before the making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth and (4) the true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

It is therefore permissible to consider what was the exact state of the law at the time the Hindu Inheritance (Amendment) Act was passed. It is clear that as regards female heirs the position prior to the Act was as follows: In Bengal, Benares, and Mithila, none but those expressly mentioned in the Mitakshara can inherit. They were widow daughter, mother, paternal grandmother, and paternal great-grandmother. The sister was no heir in these places. In Madras in addition to the abovenamed, certain other female heirs are recognized as bandhus. They could only succeed in the absence of preferential bandhus. Among these were son's daughter and daughter's daughter. Sister came in but only as a bandhu. In Bombay daughters of descendants, ascendents, and collaterals within five degrees inherit as bandhus in the order of propinquity, but it must be noted that they cannot inherit if any of the nine bandhus expressly mentioned in the Mitakshara are alive. As to the sister, she is recognized as a gotraja sapinda both in the Mitakshara and in the Mayukha: see *Bhagwan* v. *Warubai* (3). It is also recognized in Bombay that the sister comes before the widows of the gotraja sapindas, and her position in the order of succession is after paternal grandmother, but before paternal grandfather. A son's daughter and daughter's daughter were recognized as heirs only in the Bombay and Madras Presidencies, but only as bandhus. Sister's son similarly ranked only as a bandhu. As to a widow of a gotraja sapinda, the position in Bombay is that she inherits after the "compact series of heirs" and and after the sister and half sister, but subject to the rule that there is no existing gotraja sapinda within the sixth degree of the line to which her husband belonged, the widow taking the place which her husband, if alive, would have occupied.

That being the position, the question is what was the object of ths Act of 1929? Mr. Mulgaonkar wanted to refer to the proceedings in Council at the time the bill was discussed and to the speeches made in connexion therewith. But as laid down by the Privy Council in *Adminisirator-General of Bengal* v. *Prem Lal Mullick* (4), proceedings in Council, whilst a statute is being enacted, are not relevant and cannot be looked at by the Court on the question of construction of the Act. On a careful consideration of the Act as a whole it seems to me that it was enacted to bring in certain heirs, e. g., a son's daughter, daughter's daughter, sister and sister's son on the principle of propinquity be-

2. (1584) 3 Co 7a.

3. (1908) 32 Bom 300=10 Bom L R 389.
4. (1895) 22 Cal 788=22 I A 107 (P C).

fore certain other heirs who hitherto were recognized as preferential heirs in the order of succession in certain places although they were more remotely connected with the propositus by ties of blood. In my opinion the Act contemplates the succession after the father's father and leaves the law as to the order of succession before father's father undisturbed. Where therefore as in Bombay since 1867 sister is assigned a special place and takes before father's father can it be contended that the legislature intended to degrade her, to take away from her superior and vested rights she had and to allow other heirs to supersede her? To hold that the order of succession before father's father has been altered I would expect quite different language than is found in the Act. In *Watton* v. *Watton* (5) Sir J. P. Wilde said (p. 228):

"When a statute is passed creating new rights it ought, if possible, to be so construed as not to extinguish existing rights."

In *Randolph* v. *Milman* (6) Kelly, C. B. said (p. 113):

"Now we agree with the principle of law stated by Sir Roundell Palmer at the outset, that vested rights are not to be taken away without express words or necessary intendment or implication."

In *Hough* v. *Windus* (7) Bowen, L. J., said (p. 237):

". . . the recognized rule is that Statutes should be interpreted, if possible, so as to respect vested rights; . . ."

The legislature must not be supposed to do a palpable injustice. In *Ex parte Corbett* (8) Brett, L. J., observed as follows (p. 129):

"I think also that there is a general rule of construction of statutes which is applicable to this matter, namely, that unless you are obliged to do so you must not suppose that the legislature intended to do a palpable injustice . . ."

The consequence of accepting Mr. Dharap's argument would lead to so manifestly an unjust result, that I should pause before I proceed to adopt this construction of the Act. It seems to me it is in the last degree improbable that legislation would disturb the general system of law prevailing in Bombay in regard to the order of succession before father's father. Mr. Dharap says that vested rights are expressly taken away, as the rights of the other heirs after father's father are expressly taken away. That may be and that is all that, it seems to me, the legislature intended to do. It seems clear to me on a reading of the Act that the intention was to alter the recognized order of succession only after father's father and to leave the heirs before him untouched. Mr. Dharap argues that the result of adopting this construction would be to put even a son's daughter and other persons mentioned in S. 3 before the sister, before the widow of a gotraja sapinda. I do not think so. Before the Act these other heirs came in, as I have pointed out, only as bandhus and the legislature by this Act has given them a better place. That cannot and does not necessarily mean that, because in Bombay the sister is recognized as coming before the widow of gotraja sapindas, therefore, it must follow that the other persons mentioned in S. 3 would ipso facto come before the widow of a gotraja sapinda.

This brings me to the proviso. The proviso saves a local custom having the force of law. If necessary I would be prepared to hold that a sister in Bombay is assigned a fixed place on the ground of a local custom having the force of law. The cases in Bombay clearly show that it is after all on usage that the right of a sister is based. In *Mulji Purshotum* v. *Cursandas Natha* (9), after referraing to the well known case of *Vinayak Anandrav* v. *Lakshmibai* (10), decided in the Supreme Court in 1861, Sir Lawrence Jenkins observed (p. 573):

"The ratio however of the decision appears to me to be this: that in Bombay there was a general usage under which sisters were preferred to male cousins, and that if this could not be supported by the text of the Mitakshara, a point on which no certain pronouncement was made, still it had the express sanction of the Mayukha which alone was sufficient."

In *Rudrapa* v. *Irava* (1), the same learned Chief Justice puts the matter beyond doubt. That was a case from Dharwar, and it was held that the sister should be preferred as an heir to a brother's widow. At p. 86, Sir Lawrence Jenkins observed:

"It has been urged before us that in other districts of the Presidency the sisters' succession is governed by the Mitakshara, which does not

5. (1866) 1 P D 227=35 L J Mat 95=15 W R 288=14 L T 742.
6. (1868) 4 C P 107=38 L J C P 81=17 W R 262.
7. (1884) 12 Q B D 224=53 L J Q B 165=1 Morrell 1=32 W R 452.
8. (1880) 14 Ch D 122=49 L J B K 74=28 W R 569=42 L T 164.
9. (1900) 24 Bom 563=2 Bom L R 721.
10. (1861) 1 B H C 117.

name the sisters. As against this, reliance has been placed on the interpretation of the Mitakshara by Balambhatta and Nanda Pandita, who maintain that sisters are included in 'brethren' according to the true rules of Sanskrit exegesis: and in support of its applicability in the Bombay Presidency reference has been made to the opinion of Sir Michael Westropp. It is further contended that for the purpose of a sister's succession the rule of the Mayukha is not limited to Gujarat and the island of Bombay, but is also of authority in other districts of the Presidency. That there is a usage, under which the sisters succeeds as an heir when outside Gujarat and the island of Bombay, is, we think, beyond doubt; the struggle has been to reconcile that usage with the Sanskrit commentaries, but in view of the decided cases it appears to us immaterial whether we invoke in support of it the rule of Nilkantha or the interpretation of Balambhatta or Nanda Pandita."

In *Bhagwan* v. *Warubai* (3) the rule which ought to be followed is laid down by Chandavarkar, J., in these words (p. 312):

" What then is the exact place to assign to the uterine sister of a deceased Hindu in the line of his heirs in cases governed by the Mitakshara? It is well settled now for this Presidency that she is an heir. The Mitakshara is silent as to her place, and it is an established rule of this Court that where the Mitakshara is silent or obscure, we must generally speaking invoke the aid of the Vyavahara Mayukha to interpret it and harmonize both the works, so far as that is reasonably possible. The Vyavahara Mayukha brings the sister in immediately after the grandmother. Having regard to the rule just mentioned, that should be her place under the Mitakshara also. Such an arrangement would not be arbitrary, if we bear in mind two points emphasized by Vijnaneshwara in the Mitakshara."

It will be seen that although in Bombay in cases governed by the Mayukha sister is brought in by reason of a text, it is really on the ground of usage as evidenced by the text that she comes in; and under the Mitakshara she comes in on the principle laid down by Chandavarkar, J., in *Bhagwan's* case (3). Their Lordships of the Privy Council with regard to the commentaries as a source of law observed as follows:

" The rules of law enunciated in commentaries are followed in practice in the school where their authority is accepted, and they have thus acquired the sanction of usage. It is therefore the duty of British India Courts to treat these rules as law in the province in which they are recognized, even if they appear to proceed on a wrong interpretation of the Smritis, the reason being that under the Hindu system of law clear proof of usage will outweigh the written text of the law": Mulla's Hindu Law, 7th Edn., p. 10.

I do not therefore think that the place assigned to the sister in this presidency was intended to be altered by the Act, and that in any case her position is saved by reason of the proviso. I think therefore the sisters are preferential heirs than Neelava, and therefore their names should be retained on the record and that of Neelava struck off. I have come to this conclusion not without some hesitation. Undoubtedly there is force in Mr. Dharap's argument that a literal rendering of the proviso or of the Act would show that the sister's position as heir is affected. If it was the intention of the legislature to leave the order of succession prevailing in Bombay before father's father unaffected, as I think it was, it is unfortunate that more apt language has not been employed in this respect. (The rest of the judgment is not material to this report).

R.K. *Order accordingly.*

A. I. R. 1933 Bombay 276

PATKAR AND BARLEE, JJ.

Shri Sharada Peeth Math, Dwarka— Appellant.

v.

Shri Rajrajeshvarashram — Respondent.

First Appeal No. 19 of 1931, Decided on 3rd November 1931.

(a) Limitation Act (1908), Art. 120—Suit for declaration of title barred under Art. 120 —Bar affects only remedy and not the right.

Though a suit for a declaration of title to the lands might be barred under Art. 120, the bar affects only the remedy or relief by way of a declaration and does not extinguish the right and title of the true owner to the property. [P 279 C 1]

(b) Limitation Act (1908), Art. 120—Suit for declaration of title to property in custodia legis is governed by Art. 120.

The article applicable to a suit for declaration of title to the property which is in custodia legis is Art. 120, Lim. Act. [P 279 C 2]

(c) Limitation Act (1908), Art. 120—Right to sue arises only when right is infringed or threatened to be infringed.

Under Art. 120, Lim. Act, the right to sue accrues only when the defendant infringes or at least has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit: *A I R* 1930 *P C* 270, *Foll.* [P 280 C 1]

(d) Hindu Law—Mutt—Position by head of Mutt depends on custom and usage of institution.

The question as to the position of the head of the Mutt must be determined in each case upon the conditions on which they were given or which may be inferred from the long established usage and customs of the institution. [P 281 C 1]

(e) Hindu Law—Mutt—Suit for declaration of title of Acharya of Mutt is one for vindication of private and personal right.

A suit for a declaration of title of Shankaracharya and also for a declaration of title to the property is for vindication of private and per-

sonal right and not for vindication of the rights of the Mutt. [P 281 C 2]

(f) Limitation—Point must be decided on allegation in plaint.

The point of limitation must be decided on the allegations made in the plaint. [P 281 C 2]

(g) Limitation Act (1908), Ss. 9 and 14—Whether when limitation once begins to run, it can be suspended otherwise than according to provisions of S. 9 or other similar provision of Limitation Act (Quaere).

Quaere.—When once limitation begins to run, whether it can be suspended otherwise than according to S. 9 or other provisions, the two conflicting views are (1) that there may be a revival of the right to sue when the previous satisfaction of the claim is nullified with the result that the right to sue which has been suspended is animated, and the true test to determine whether a cause of action accrued is to ascertain the time when the plaintiff could have maintained his action to a successful result; (2) that except perhaps in cases where injustice has been occasioned by a Court by its own acts or oversight there is no scope for the application of any principles of equity in the administration of Statute law of limitation, and a revival of a cause of action once satisfied or cancelled is foreign to the conceptions of the Statute law of limitation: [P 284 C 1, 2]

H. C. Coyajee, *R. W. Desai* and *Y. W. Desai*—for Appellant.

G. N. Thakor, *Hiralal D. Nanavati*, *T. H. Nanavati* and *H. V. Divatia*—for Respondent.

Patkar, J.—This was a suit brought by the plaintiff for a declaration that he was entitled on behalf of the Sharada Peeth Math at Dwarka to obtain and retain possession of the property which was in custodia legis and held by the administrator appointed under Regn. 8 of 1827, and for an injunction restraining the defendants from recovering possession of the property and from asserting their claim as Acharya of the Sharada Peeth Math.

It is common ground that the last holder of the Shrada Peeth Math of Dwarka was Madhav Tirtha, who died at Dakore on 27th September 1916, without designating his successor. On his death the Collector took possession of the property and handed it over to the District Judge under Regn. 8 of 1827. The District Judge under S. 10, Regn. 8 of 1827, issued a proclamation under App. C, Ex. 86, on 17th October 1916. In pursuance of the proclamation three claimants appeared: (1) defendant 1, (2) Shantyanand as the nominee of the Baroda Government, and (3) Purnanand. Defendant 1 advanced his claim on 11th November 1916, alleging that he was the eldest disciple of Madhav Tirth. He is known by three names: (1) Appaji Ayya, (2) Parmanand Swarup, and (3) Rajrajeshvarshram. On 16th December the claim of the Baroda State to appoint the Shankaracharya was notified to the District Judge by Mulji Nathji, Ex. 87, who was appointed local agent of the Devasthan Assistant of Baroda. On 18th May 1917 the Baroda State appointed Shantyanand Saraswati as the successor of the last Shankaracharya Madhav Tirtha and he was installed on the gadi at Dwarka on 5th June 1917. On 14th July 1917, Swami Shantyanand applied to the District Court by Ex. 101. Claimant 3, Purnanand, gave up the contest, and on 9th August 1917, Mr. Kennedy, the District Judge, passed an order delivering the property to Shantyanand by Ex. 68, on the ground that he was the de facto occupant of the gadi, and had been installed at Dwarka and was in possession of the property situate there and subject to the control of the Shankaracharya.

Against this order Appeal No. 245 of 1917 was filed by defendant 1 to the High Court. Defendant 1 also filed suit No. 667 of 1917 on 13th August 1917, against Shantyanand and applied for an injunction against him restraining him not to style himself as Shankaracharya. The trial Court having refused the injunction, defendant 1 applied in revision by Civil Extraordinary Application No. 234 of 1917. The first appeal, No. 245 of 1917, and this application were heard together. Scott, C. J., and Shah, J., held that as soon as two or more claimants came forward in answer to a proclamation under S. 10, Ch. 2 of the Regulation, the provisions of S. 9 applied to the case, and, following the decision in *Shri Vishvambhar* v. *Shri Vasudev* (1), held that the Judge could not make an order delivering the property to one of the claimants under the Regulation so long as the party against whom the decision was given had a right of appeal, and that the word "determined" in S. 9 of Regulation 8 of 1827 must be understood as "finally determined," and therefore set aside the order handing over the property to Shantyanand, the occupant of the Dwarka gadi, until the final determination of title had been come to, and did not think it neces-

1. (1892) 16 Bom 708.

sary to deal, under S. 115, Civil P. C., with the order refusing the application for injunction in Suit No. 667. The Suit, No. 667 of 1917, referred to above, which was brought by defendant 1 for setting aside the order passed four days before the institution of the suit in favour of Shantyanand, dragged on for nearly nine years. Though issues were raised on 7th October 1919, nothing effective was done till 16th February 1926, when Shantyanand, the nominee of the Baroda Government, died. On 19th June 1926, the Court passed an order, Ex. 56, under O. 22, R. 4, sub-R. (3), that the suit abated. The result of the abatement order is that no fresh suit can be brought by defendant 1 on the same cause of action under O. 22, R. 9, sub-R. (1), Civil P. C.

The present plaintiff was appointed by the Baroda Government on 19th November 1927. No steps were taken by defendant 1 to set aside the abatement under O. 22, R. 9. Meanwhile, on 22nd June 1926, defendant 1 thinking that the line was clear applied to the District Judge for possession of the property by Ex. 67. On 8th August 1926, the District Judge entertained the application and postponed the final orders till 20th August 1926, by Ex. 91. On 20th August 1926, Mr. Davis, the District Judge, passed the final order, Ex. 92, in favour of defendant 1. On 11th November 1926, Swarupanand, defendant 2, brought Suit No. 19 of 1926 against the present defendant 1, claiming to be the successor of the last Acharya Madhav Tirth through one Trivikram Tirthji who was alleged to have been installed as Shankaracharya on 21st June 1917, and was succeeded by Bharati Krishna Tirthji who selected defendant 2 to succeed him at Dwarka. Defendant 2, Swarupanand, also applied to the Distsict Court under the regulation for revocation of the order made in favour of defendant 1. But the application was rejected on 20th November 1926, by Ex. 93. Defendant 2 filed First Appeal No. 423 of 1926 against the order of the District Judge to the High Court, and Marten, C. J., and Baker, J., on 18th January 1927, ordered that the property should not be handed over to either party until the determination of the suit brought by Swarupanand, defendant 2: see Ex. 94. On 24th September 1927, the Subordinate Judge dismissed the suit of defendant 2 on the ground of limitation. Defendant 2 filed an appeal No. 532 of 1927, which was dismissed by Madgavkar and Allison, JJ., on 9th September 1929. It was brought to the notice of the appeal Court that the Baroda State had nominated the plaintiff as the successor of Shantyanand who had brought the present suit No. 24 of 1928 in the First Class Subordinate Judge's Court at Nadiad, and the Court directed that the property should remain with the administrator till the final decision of the present suit as the title would presumably be determined in the present suit. The present plaintiff, who was appointed by the Baroda Government on 19th November 1927, applied to the District Court on 12th February 1929 to be brought on the record of the proceedings under Regn. 8 of 1827 by Ex. 90, and he was accordingly brought on the record on 13th January 1930. The present suit had already been brought by the plaintiff on 4th August 1928.

The learned Subordinate Judge raised several issues and dismissed the plaintiff's suit on the ground that the cause of action arose on the date of the death of Madhav Tirtha or on the date on which the administrator took possession and that the plaintiff's suit was barred by limitation under Art. 120, Lim. Act. The learned Subordinate Judge did not decide the case on the merits, and did not take any evidence and record any findings on the material issues of facts arising in the case covered by Issues 9, 10, 11 and 12. The real contest in this suit is between the present plaintiff and defendant 1. Defendant 2's suit was already dismissed on the ground of limitation. According to the decision of the High Court the administrator was to remain in possession till the title of any of the rival claimants was finally determined under S. 9, Regn. 8 of 1827. Defendant 1 by reason of the order of abatement of his suit No. 667 of 1917, cannot bring another suit to establish his title under O. 22, R. 2, sub-R. (1); and if the decision of the lower Court that the plaintiff's suit is barred by limitation is right, there will be no final determination of the title of any of the claimants in a civil suit. Though a suit for a declaration of title to the lands

might be barred under Art. 120, the bar effects only the remedy or relief by way of a declaration and does not extinguish the right and title of the true owner to the property. S. 28, Lim. Act, is limited in its operation to suits for possession of property and the right of the true owner to lands cannot be extinguished however long the attachment of the property may continue, according to the decision in *Rajah of Venkatagiri* v. *I. Subbiah* (2). Defendant 1 being incapable of establishing his title in a separate suit and the plaintiff's right not being extinguished even though a suit for a declaration may be barred, the condition of things would come to an impasse if the administrator is to remain in possession till the title to the property is finally determined according to S. 9, Regn. 8 of 1827. It is possible to hold that in such a state of things the District Judge himself will have to determine the question of title, finally under S. 9, Regn. 8 of 1827. The question therefore arising in this appeal is a question of limitation. It is a common ground that the article applicable to a suit for declaration of title to the property which is in custodia legis is Art. 120, Lim. Act.

It is urged on behalf of the plaintiff that the cause of action arose when the plaintiff was installed as the Acharya, i. e., on 19th November 1927, and the present suit being brought within six years from the date of his nomination by the Baroda Government his installation is within time. The learned Subordinate Judge held that the suit is barred because Shantyanand, the nominee of the Baroda Government and the predecessor-in-title of the present plaintiff, did not bring a suit within six years from the time when the cause of action arose, that is, from the date when the administrator took possession of the property, and secondly, that if the plaintiff was not the successor of Shantyanand, the plaintiff is barred because the Baroda Government did not bring a suit within six years from the time when the administrator took possession. It would appear that it was not necessary for Shantyanand to bring a suit as an order was passed in his favour on 9th August 1917, and a suit was brought by defendant 1 four days afterwards on 13th August 1917, which continued till the death of Shantyanand in 1926. It would also appear that it was not competent for the Baroda Government to bring a suit because only the right of nomination was alleged to rest in the Baroda Government, and as soon as a Shankaracharya was nominated or approved by the Baroda Government, it is the nominee who has to bring a suit.

The question however of limitation must be approached on two hypotheses: first, that the plaintiff claims independently of Shantyanand and as the nominee of the Baroda Government, and secondly, that he claims through Shantyanand, who was defendant 1 in the previous suit No. 667 of 1917. The plaintiff in his plaint claims in his own right and does hot claim through Shantyanand. It is urged on behalf of the respondent that in paras. 10 and 11 of Ex. 34, the plaintiff suggested that he claimed through Shantyanand as he alleged that the present defendant 1 took no steps to set aside the attachment and proceed with the suit after he came to know that the present plaintiff was selected and installed on the gadi at Dwarka. It appears that the plaintiff has been tripped into putting forward that argument probably on account of the statement made in para. 3 of the plaint, Ex. 1, and para. 21, Cl. (e), of the written statement, Ex. 24. But reading the pleadings as a whole I do not think that the plaintiff anywhere alleged that he claimed through Shantyanand. A reference is further made to point No. 4 in this appeal in which Shantyanand is referred to as the immediate predeceseor-in-title, but it does not follow therefrom that though Shantyanand may be the predecessor-in-title the plaintiff necessarily claims through him. The reversioner does not claim through the widow nor does a second reversioner claim through the first reversioner though the widow and the first reversioner might be loosely called the predecessor-in-title. The plaintiff's case was that Shantyanand was nominated as the Acharya by the Baroda Government and was entitled to be the Acharya on account of that nomination. Similarly, the plaintiff after the death of Shantyanand was appointed by the Baroda Government and claimed in his

2. (1902) 26 Mad 410.

own right by virtue of the nomination by the Baroda Government and the installation as the Acharya. From the pleadings it does not appear that the plaintiff claims through Shantyanand. It is common ground that Art. 120, Limitation Act, applies, and if the plaintiff does not claim through Shantyanand that the cause of action accrued to the plaintiff on the date of his nomination and his installation in the year 1927, and the suit would be within time.

According to the decision of the Privy Council in *Bolo* v. *Koklan* (3), under Art. 120, Limitation Act, the right to sue accrues only when the defendant infringes or at least has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. The plaintiff could not bring a suit before his installation, and if he claims in his own right and not as successor to Shantyanand, his claim would be within time: See also *Annamalai Chettiar* v. *Muthukaruppan Chettiar* (4) and *Gobinda Narayan Singh* v. *Sham Lal Singh* (5). The learned Subordinate Judge has not taken any evidence and found on the essential questions arising in the case as to the custom relating to the Acharya, whether the Acharya can be nominated by the Baroda Government or whether he is to be elected in the absence of any designation of a proper person by the previous Acharya. There is considerable divergence of opinion as to the true position of the head of the institution known as mutt. It was held in *Ram Parkash Das* v. *Anand Das* (6) that an Asthal or Mutt is an institution of a monastic nature and is established for the service of a particular cult, the instruction in its tenets and the observance of its rites. The followers of the cult and disciples in the institution are known as chelas who are of two classes, celibate and non-celibate. The Mahant or the Asthal must by the custom of the mutt be a bairagi or religious chela. The Mahant is the head of the institution, sits upon the gadi, initiates candidates into the mysteries of the cult, superintends the worship of the idol and the accustomed spiritual rites, manages the property of the institution and administers its affairs, and the whole assets are vested in him as the owner thereof in trust for the institution itself. At p. 76 it is observed :

> "The question as to who has the right and office of Mahant is one, in their Lordships' opinion, who, according to the well-known rule in India, must depend upon the custom and usage of the particular mutt or asthal. Such questions in India are not settled by an appeal to general Customary law; the usage of the particular mutt stands as the law therefor."

The learned Subordinate Judge has not gone into the evidence and ascertained the custom of the mutt as to the person who is entitled to be appointed to the right and office of the Acharya and the custom and usage of the particular mutt in respect of the appointment of such Acharya. The case of the plaintiff is that the Acharya designates a fit person to be his successor and that appointment is approved by the Baroda Government, and in the absence of such designation and approval, the Baroda Government has power to nominate. In fact the plaintiff's case is that the authority to represent the mutt at Dwarka is derived from the nomination by the Baroda Government. The case on behalf of defendant 1 is that in the absence of a designation of a proper person to succeed as the Acharya by the previous incumbent of the office, a proper and fit person is elected as the Acharya, and that it is not necessary that he should be appointed to the office at Dwarka, but that if a proper person is elected as successor at Dakore, he is entitled to occupy the gadi of the Shankaracharya of the Sharada Peeth.

In *Mohunt Rama Nooj Doss* v. *Mohunt Debraj Doss* (7) it was held that the mutts were of three descriptions, namely, mouroosi, punchaiti and hakimi, that in the first the office of Chief Mahant was hereditary and devolved upon the chief disciple of the existing Mahant, who moreover usually nominated him as his successor; that in the second the office was elective, the presiding Mahant being selected by an assembly of Mahants ; and that in the third the appointment of the presiding Mahant was vested in the ruling power presumably the civil power or in the

3. A I R 1930 P C 270=127 I C 737=57 I A 325=11 Lah 657 (P C).
4. A I R 1931 P C 9=130 I C 609=58 I A 1=8 Rang 645 (P C).
5. A I R 1931 P C 89=131 I C 753=58 I A 125=58 Cal 1187 (P C).
6. A I R 1916 P C 256=33 I C 583=43 I A 73=43 Cal 707 (P C).
7. (1839) 6 Sud Dew Ad (Cal) 262.

party who endowed the temple. In the absence of any evidence and finding on the point as to the custom relating to the appointment of the Acharya of the Sharada Peeth, it is difficult to hold that the plaintiff necessarily claims through the previous Acharya. The case of the plaintiff is that after the death of Madhav Tirth, Shantyanand was nominated by the Baroda Government, and after his death the present plaintiff is appointed as the Acharya. It does not therefore necessarily follow that the plaintiff claims through the previous Acharya, and in the pleadings there is no allegation that the present plaintiff claims through Shantyanand.

As to the position of the head of a Math it was held in *Ram Parkash Das* v. *Anand Das* (6) that the whole assets are vested in him as the owner thereof in trust for the institution itself. In *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (8) it was held that the head of a Math is not a mere trustee but a "corporator sole" having an estate for life in the permanent endowments of the Math and an absolute property in the income derived from offerings subject only to the burden of maintaining the institution—in other words, a superior of a Math is not a trustee but a "life tenant." In *Kailasam Pillai* v. *Nataraja Thambiran* (9) it was held that it cannot be predicated of the head of a Math, as such, that he holds the Math properties as a life tenant or trustee. The question must be determined in each case upon the conditions on which they were given or which may be inferred from the long established usage and customs of the institution. The lower Court has not investigated into the long established custom or usage of the institution in suit. In *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (10) it was held that the head of a Math is not a trustee of the endowments of a Hindu Math save as to the specific property vested in him for a specific object and it was held at p. 327 that according to the well settled law of India (apart from the question of necessity) a Mahant is incompetent to create any interest in respect of the Math property to endure beyond his life. In *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal* (11) it was held that the nature of the ownership is an ownership in trust for the institution itself, that while the ownership in the general case is with the spiritual head of the institution, still the property may be held on different conditions and subject to different incidents, and that there are varieties of circumstances and tenure and in respect of these the usage and custom of the Math fall to be determined, and once that usage and custom are clear they form the law of the Math.

Both the parties agree that the last Acharya was Madhav Tirtha who was the Shankaracharya of the Sharada Peeth. The title of the Math to the property in suit is not in dispute. The dispute is between the two rival claimants who claim a declaration of title of Shankaracharya and also the declaration of title to the property in suit. The suit is for vindication of private and personal right and not for vindication of the rights of the Math: see *Babajirao* v. *Laxmandas* (12). The plaintiff in this suit claims to vindicate his private right and bases his claim on the nomination by the Baroda Government. Shantyanand was also nominated by the Baroda Government. It is difficult to hold that the second nominee claims through the first nominee in the absence of any admission or evidence to that effect. If the plaintiff fails to prove that the Baroda Government have the right of nomination, he will fail on the merits. There is no admission of the plaintiff that he claims through Shantyanandji. It is therefore difficult to hold, in the absence of any evidence or admission on the point, that the present plaintiff claims through Shantyanand, who was alleged to have been nominated by the Baroda Government in the year 1917. The point of limitation must be decided on the allegations made in the plaint, and I am not satisfied that the plaintiff's claim is barred by limitation, as the plaintiff has never alleged that he claims through Shantyanand. The decision in First Appeal No. 532 of 1927 brought by Swarupanand, defendant 2, by Madgavkar and Allison, JJ., can be

8. (1904) 27 Mad 435=14 M L J 105.
9. (1910) 33 Mad 265=5 I C 4.
10. AIR 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831 (P C).
11. AIR 1919 P C 62=53 I C 288=46 I A 204=43 Mad 253 (P C).
12. (1903) 28 Bom 215=5 Bom L R 932.

distinguished on the ground mentioned in the judgment, viz., that defendant 2 claimed as successor in the line of Trivikram Tirth, and Trivikram Tirth did not bring a suit within six years from the time when he came to know that the defendant got himself installed as Shankaracharya. Further, it is mentioned in the judgment that

"Trivikram could and should have applied to the District Court in the proceedings under the Bombay Regn. 8 of 1827 and to the First Class Subordinate Court to be joined however as a party in the suit by the plaintiff (i. e., present defendant 1) against Shantyanand."

If, on the other hand, the plaintiff can be said to claim through Shantyanand, the question arises whether any cause of action had arisen in order to compel Shantyanand to bring a suit, and if so, whether the time occupied by Suit No. 667 of 1917 from 13th August 1917, the date of the institution of the suit, to 16th February 1926, when Shantyanand died, should not be excluded in computing the period of limitation for the present suit. It is contended on behalf of the appellant that the period occupied in the previous suit ought to be excluded under S. 14 liberally construed on the authority of the decision in *Lakhan Chunder Sen* v. *Madhusudan Sen* (13) where the right of the plaintiff to bring an action was held to be suspended during the period occupied by the previous litigation though the case was not covered by S. 14, Lim. Act. The decision of the Calcutta High Court was confirmed by the Privy Council in *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (14).

On the question whether Shantyanand, assuming that he was the person from whom the plaintiff claims, had a cause of action to bring a suit, it appears that on 9th August 1917, Mr. Kennedy passed an order in favour of Shantyanand by Ex. 68 and Suit No. 667 was brought by defendant 1 specifically for the purpose of setting aside that order only four days after the order passed in favour of Shantyanand. That suit dragged on for nearly nine years till Shantyanand died on 16th February 1926. It was not necessary for Shantyanand to bring a suit for a declaration, as according to the decision of Scott, C. J., and Shah, J., in First Appeal No. 245 of 1917, the question of title was to be finally determined in the suit, and the refusal by the Subordinate Judge of the application of defendant 1 for an injunction against Shantyanand was not interfered with, as the administrator was to remain in possession until a final determination of title was come to. It has been repeatedly held by the High Court, whenever the case came up in several appeals, that the administrator was to hold possession till the question of title was finally determined, and if the suit had been expedited, the question of title would have been finally determined in Suit No. 667 of 1917. Though the order of the District Judge handing over possession to Shantyanand passed on 9th August 1917 was subsequently set aside by the High Court, no order was passed in favour of the present defendant 1, and the administrator was ordered to remain in possession till the question of title was finally determined, and the question of title would have been finally determined by Suit No. 667 of 1917 brought by defendant 1 specifically for the purpose of setting aside the order of Mr. Kennedy. Even if a suit had been brought by Shantyanand, it would have been stayed under S. 10, Civil P. C. Can it be said that Shantyanand had a cause of action to bring a suit ?

He was installed on the gadi after nomination by the Baroda Government. Mr. Kennedy recognized his right and passed an order in his favour, and though the order was set aside by the appellate Court, no order was passed in favour of defendant 1, and the refusal of the application by defendant 1 for injunction against Shantyanand was not interfered with by the High Court in revision on the express ground that the administrator was to remain in possession till a final determination of title was come to. The Suit No. 667 of 1917, brought by defendant 1 was pending, in which the question of title would have been finally determined within the meaning of S. 9, Regn. 8 of 1827. The mere bringing of the Suit No. 667 of 1917, by the present defendant 1 cannot be considered as affording a cause of action necessitating the bringing of a suit by Shantyanand. The cause of action for recovery of possession of the property accrued to Shantyanand either on the date of death of

13. (1907) 35 Cal 209=7 C L J 59=12 C W N 326.
14. AIR 1916 P C 96=33 I C 452=43 Cal 660 (P C).

Madhav Tirth or on the date of his own nomination. Shantyanand's title was recognised by the Baroda Government and he was installed on the gadi in 1917, and in view of the allegations in the plaint it is doubtful if it was necessary for Shantyanand to bring a suit for possession of an hereditary office within Art. 124, Lim. Act. The property in suit was taken possession of by the administrator under Regn. 8 of 1827 who held it for the rightful owner. Mr. Kennedy passed an order in favour of Shantyanand, and though the order was set aside in appeal, the administrator was ordered to remain in possession till the title to the property was finally determined. Defendant 1 brought Suit No. 667 of 1917 four days after the order handing over the property to Shantyanand to set aside the order, and the question of title would have been finally determined in that suit. The suit dragged on for nine years till the death of Shantyanand in 1926. I do not think on the materials in the present case that there was any cause of action necessitating the bringing of a declaratory suit by Shantyanand, and if it was not necessary for Shantyanand to bring a declaratory suit, the suit of the present plaintiff would not be barred on account of the failure of Shantyanand to bring a suit.

Before the present plaintiff was nominated by the Baroda Government on 19th November 1927, there was the order passed in favour of defendant 1 on 20th August 1926, by the then District Judge, Mr. Davis. The present suit is brought within six years from that date. That order could not be carried into effect on account of the suit brought by defendant 2, Swarupanand, and in Swarupanand's appeal it was ordered by Madgavkar and Allison, JJ., that the administrator should hold possession of the property till the question of title was determined in the present suit, and the present plaintiff applied on 12th February 1929, to be made a party in the proceedings before the District Judge under Regn. 8 of 1827, and he was accordingly brought on the record of those proceedings. Under these circumstances I think that, even assuming that the plaintiff claims through Shantyanand, the present suit is not barred on account of the failure of Shantyanand to bring a suit for a declaration of his title, for it was not necessary for him to bring a suit. He was installed on the gadi of Shankaracharya by the order of the Baroda Government and took possession of the property at Dwarka and also got the property in suit by the order of Mr. Kennedy, and though the order of Mr. Kennedy handing over the property to Shantyanand was set aside in appeal, there was no order handing over the property in favour of defendant 1 and the suit brought by defendant 1 against Shantyanand was pending till 1926, that is till Shantyanand's death.

Assuming however that there was a cause of action to bring a suit and that Shantyanand could not have got the property, as urged on behalf of respondent 1 before us, unless he had got a declaration in his favour in the event either of defendant 1 having withdrawn the suit against Shantyanand or his suit having failed for any other reason, the question will have to be considered whether the time occupied by the suit No. 667 of 1917 can be deducted in the peculiar circumstances of the present case. This question does not arise on the conclusions I have reached on the other points. In the event of withdrawal of suit by defendant 1 or the failure of his suit on any ground other than on its merits, the position of Shantyanand would not have been in any way worse than that of defendant 1.

It is contended on behalf of respondent 1 that when once time begins to run, no subsequent inability or disability would stop the running of time. It is contended on behalf of the appellant that the time occupied in the previous litigation should be deducted under S. 14, Lim. Act, liberally construed according to the decisions in *Lakhan Chunder Sen* v. *Madhusudan Sen* (13) and *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (14). It might be deduced from the decisions of the Privy Council in the cases of *Prannath Roy* v. *Rookea Begum* (15), *Mt. Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (16), *Hem Chunder* v. *Kali Prosunno* (17) and *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (14), that ordinarily limitation runs rom the earliest time at which an action can be brought and that after time has once

15. (1859) 7 M I A 323=4 W R 37 (PC).
16. (1868) 12 M I A 244 (PC).
17. (1903) 30 Cal 1033=30 I A 177 (PC).

begun to run there may be revival of the right to sue when the previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is revived. It is urged, on the other hand, that the principle that once time has begun to run no subsequent disability or inability to sue stops it, has been applied in the cases of *Hurro Pershad Roy* v. *Gopal Chunder Dutt* (18), *Soni Ram* v. *Kanhaiya Lal* (19) and *Juscurn Boid* v. *Pirthichand Lal* (20). The question has been considered by the Full Bench of the Madras High Court in *Muthu Korakkai Chetty* v. *Madar Ammal* (21), where the majority of the Judges held that when the time had once begun to run, it could not be suspended otherwise than according to the provisions of S. 9 or any other similar provision of the Limitation Act itself. But Sadasiva Ayyar, J., however took a different view, and relying on the decisions in the cases of *Lakhan Chunder Sen* v. *Madhusudan Sen* (13), *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (14) and *Mt. Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (16) held that notwithstanding S. 9, Lim. Act, there are exceptional cases where such suspension of the cause of action for a suit can take place on the liberal construction of S. 14, Lim. Act. A similar view was taken in the cases of *Abdul Rahim Oosman & Co.* v. *Ojamshee Purshottamdas & Co.* (22), *Ramdutt Ramkissendass* v. *E. D. Sassoon & Co.* (23) and *G. Bhandari* v. *R. Nihalchand* (24). Different and somewhat conflicting views were taken in the case of *Dwijendra* v. *Joges* (25) and *Sm. Sarat Kamini Dasi* v. *Nagendra Nath Pal* (26).

The conflicting views are (1) that there may be a revival of the right to sue when the previous satisfaction of the claim is nullified with the result that the right to sue which has been suspended is animated, and the true test to determine whether a cause of action accrued is to ascertain the time when the plaintiff could have maintained his action to a successful result, (2) that except perhaps in cases where injustice has been occasioned by a Court by its own acts or oversights, there is no scope for the application of any principles of equity in the administration of statute law of limitation, and a revival of a cause of action once satisfied or cancelled is foreign to the conceptions of the Statute law of limitation. If the present plaintiff is considered to claim through Shantyanand and that it was necessary for Shantyanand to bring a suit in the year 1916 or 1917, I would be inclined to hold, though not without hesitation, that in the peculiar circumstances of the present case, the time occupied in the previous suit should be excluded under S. 14, Lim. Act, liberally construed. If the time occupied by suit No. 667 of 1917 is excluded, it is clear that the plaintiff's suit is within time.

Though it is not necessary to decide the point, having regard to the conclusions which I have reached on the other points, I would be inclined to hold either that the time occupied by suit No. 667 of 1917 should be excluded under S. 14, Lim. Act, liberally construed or that if the cause of action had accrued to Shantyanand, there was a satisfaction of Shantyanand's claim by the order of Mr. Kennedy handing over the property to him, and though the order was set aside on appeal, there was no order handing over the property to defendant 1, and the refusal of the application by defendant 1 for injunction against Shantyanand was not set aside by the High Court but the administrator was ordered to remain in possession till the question as to title was finally determined, in other words, there was cancellation of the cause of action operating to suspend the right of Shantyanand, and the suspension of the right was not removed till Shantyanand's death. Assuming the suspension of the right was removed by the order of Mr. Davis, Ex. 92, on 20th August 1926, putting defendant 1 in possession, the suit of the plaintiff brought within six years from that date is within time. The result would be the same if it is held, as I have already done, that there

18. (1882) 9 Cal 255=9 I A 82 (PC).
19. (1913) 35 All 227 = 19 I C 291 = 40 I A 74 (PC).
20. A I R 1918 P C 151=50 I C 444=46 I A 52=46 Cal 670 (PC).
21. A I R 1920 Mad 1 = 54 I C 66 = 43 Mad 185 (FB).
22. A I R 1930 Cal 5=120 I C 710=56 Cal 639.
23. A I R 1929 P C 103=115 I C 713=56 I A 128 =56 Cal 1048 (PC).
24. A I R 1929 Rang 55 = 117 I C 52 = 6 Rang 691.
25. A I R 1924 Cal 600=79 I C 520.
26. A I R, 1926 Cal 65=89 I C 1000.

was no accrual of a cause of action to the present plaintiff for a declaratory suit till the order of Mr. Davis on 20th August 1926, or till the installation of the present plaintiff.

I think, on the whole, that the view of the lower Court on the point of limitation cannot be sustained. I would therefore reverse the decree of the lower Court and remand the case for decision on the merits, and I think, having regard to the previous decisions of this Court, the lower Court should not now go into any technical or preliminary questions, but should take evidence on the important questions arising in the case and decide on the essential questions relating to the title to the property in custody of the administrator and should dispose of the suit on the merits as quickly as possible. This litigation has been extending for a period of nearly fourteen years and it is to be regretted that the learned Subordinate Judge disposed of the suit on preliminary points without dealing with the case on the merits. I would therefore reverse the decree of the lower Court and remand the case for decision on the merits. Costs costs in the suit.

Barlee, J.—This suit has been dismissed as time-barred. The question of limitation has been tried as a preliminary issue, and the simple point for decision is whether, if the facts pleaded by the plaintiff-appellant be correct, the suit was instituted more than six years after his cause of action had accrued. He claims a declaration of title, and it is common ground that the Article of the Limitation Act which is applicable is No. 120, which allows him six years from the date on which his cause of action accrued.

There are two pleadings to be considered, the plaint and a counter written statement. The plaint is a short document and clearly drafted. In paras. 1 to 4 the plaintiff sets out shortly the history of the disputes over the right to succeed Shrimant Shankaracharya Madhav Teerthji, who died in 1916, and was the last undisputed Shankaracharya. He states (para. 1) that the Shri Sharada Peetha Matha is situated at Dwarka within the raj of His Highness the Maharajah Gaekwad of Baroda : but owns property in British India, particularly at Dakore; that His Holiness Swami Shri Madhav Teerthji died at Dakore in September 1916 ; (para. 2) that the mamlatdar took possession of the Dakore properties and that in 1917 the District Judge of Ahmedabad, after hearing defendant 1, who was a claimant, passed an order in favour of Swami Shri Shantyanandji who had been installed as Shankaracharya; but that the District Judge's order was later set aside in this Court ; (para. 3) that defendant 1 instituted Suit No. 667 of 1917 against Swami Shri Shantyanandji ; that the latter died during the pendency of the suit which abated ; (para. 4) that defendant 2 also is a claimant ; (para. 5) that the property is still held by the administrator appointed by the District Court; that he, the plaintiff, was installed as Shankaracharya on 19th November 1927, and is entitled to the said property ; and (para. 7) that the cause of action accrued on 19th November 1927. In answer to the written statements of defendant 1 and defendant 2 the plaintiff filed a counter written statement in which he pleaded : (After setting out the important paras, the judgment proceeded.) Para. 11 is an answer to para. 21 (c) of the written statement of defendant 1 which runs :

> "In para. 3 the plaint ought to state whether Swami Shantyanandji had any legal representative who could be brought on the record" (in Suit No. 667 of 1917).

We are not concerned with the correctness of these allegations. The suit has not been heard on the merits. We have therefore to assume the truth and correctness of the facts pleaded, and to decide whether plaintiff's cause of action arose more than six years before the suit. Prima facie it arose within that period. The plaintiff has stated that he was installed on 19th November 1927, and that is the date which he has given in his plaint as the date of the accrual of his cause of action. It follows, then, that his suit cannot be time-barred unless it can be made to appear that, according to the true interpretation of his pleadings, when read as a whole, he is claiming through a predecessor whose claim would have been barred in November 1927. Two arguments have been advanced against his claim; firstly, that he is the nominee of the Durbar and that the right to nominate has been lost

owing to the laches of the Durbar; and, secondly, that he is claiming through the deceased Shantyanandji, and has the same cause of action, that afforded by the counter-claim of defendant 1 in 1917.

The first argument appealed to the learned Subordinate Judge, but has not, I think, been seriously pressed by the learned counsel for respondent 1. Mr. Thakor has, it is true, made capital of the statement in para. 11 of the counter written statement, that on the death of an Acharya the properties of the gadi vest in the Durbar. But in para. 9 the plaintiff pleaded that on such occasions the properties "vested in the management of the Baroda State," and reading these sentences in their context I think it clear that the plaintiff was claiming for the State, not a right of ownership, but the right of control which is inherent in a sovereign power. The reasoning of the learned Subordinate Judge is that the suit is practically one by the Baroda Government to establish their right of nomination and appointment, and that the Durbar could have filed a suit to have the succession determined. This view is not justified by the plaintiff's pleadings and that is the least that can be said. It is the plaintiff's case, as I understand it, that, since the mutt is at Dwarka, succession to the gadi is controlled by the Government which has jurisdiction at Dwarka, and that appointments made by the ruling power must be recognized by the civil Courts of other States. It is not his case that the Baroda Government has any private rights, which have been transferred to himself. The learned Subordinate Judge has himself found that the State is not putting forward any claim to the property of the gadi. I can find nothing in the pleadings to justify his view; and his finding that the plaintiff's claim is time-barred owing to the neglect of the Baroda Government to file a suit is, in my opinion, radically unsound. Obviously a ruling State cannot be expected to seek the recognition of its sovereign powers in the Municipal Courts of another State.

The next question is whether the plaintiff is suing as the legal representative of Swami Shri Shantyanandji. Apart from para. 11 of his counter written statement there is nothing in his pleadings to suggest that he claims through Swami Shri Shantyanandji. His plaint is quite clear. In it he bases his claim on his installation at Dwarka on 19th November 1927.

In the first part of his counter written statement he is even more explicit. He distinguishes between the succession of an Acharya, who had been nominated by his predecessor, and the appointment of an Acharya when there has been no such nomination. He claims that in his case there had been no nomination and that his title is based on his appointment by the sovereign power. It is only in para 11 of the counter written statement that Mr. Thakor has found any material for his argument on this point, and it must be admitted that, read by itself, this paragraph suggests that the plaintiff looked on himself as the legal representative of Swami Shri Shantyanandji. But this paragraph is altogether inconsistent with the facts pleaded before, and itself contains a mere argument and not a statement of fact. I am unable, then, to agree that it justifies the view that the plaintiff was suing as the legal representative of his predecessor. The learned counsel has found one other ground for his argument, but that comes from the memorandum of appeal, and not from the pleadings, and is not, in my opinion, substantial. In this document the plaintiff speaks of Shantyanandji as his predecessor-in-title, and Mr. Thakor asks us to interpret this as meaning that the plaintiff looked on himself as a legal representative. I am not prepared to do so. Whether plaintiff claims through Swami Shri Shantyanandji or not, he can properly speak of him as his predecessor-in-title, in the same way as a reversioner, who follows a Hindu widow, may speak of her as his predecessor-in-title, though in fact he claims, not through her, but through her deceased husband.

For these reasons I disagree with the learned Subordinate Judge and consider that the plaintiff was claiming in his own right based on his installation and not through Swami Shri Shantyanandji. His suit, therefore, is not time-barred. This finding is sufficient for the decision of this appeal. But as an alternative case has been set up by the appellant and discussed at considerable length, I

must deal with it and shall try to do so as briefly as I can. In the alternative Mr. Coyajee has argued that, even if the plaintiff be held to be the legal representative of Swami Shri Shantyanandji he has a right to sue. The question, then, is whether Swami Shri Shantyanandji could have sued in 1927 had he been alive. Mr. Coyajee's argument is that Shantyanandji was not required to file a suit to establish his rights, firstly, because they were in issue in the respondent's suit; and secondly, because the respondent's suit was not a threat to his interests within the meaning of S. 42, Lim. Act. He relies on *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (14) which confirmed the decision of the Calcutta High Court in *Lakhan Chunder Sen* v. *Madhusudan Sen* (13). Now, these cases, in my opinion justify the view that Shantyanandji had a cause of action in 1917 when the respondent put forward his claim; but that, when the District Judge had decided in 1918 that he, Shantyanandji, was entitled to the property, his title ceased to be in jeopardy and that he had no need to sue whilst that order of the District Judge was in force. The ratio decidendi of the cases cited was that a man who has obtained satisfaction is not required to sue to enforce rights which have been decided in his favour. In the alternative I am prepared to hold that the proceedings under the Regulation were of a civil nature and that S. 14, Lim. Act, entitles the plaintiff to exclude the period during which he was conducting them up to the date on which the District Judge's order was set aside. Accordingly, I start with the assumption that the period between the death of Shrimant Shankaracharya Madhav Teerthji and the decision of this Court, by which Mr. Kennedy's order was reversed, is to be excluded.

This brings me to 1918 and the simple question is whether a cause of action accrued to Shantyanandji then; for, if a cause of action did accrue, a suit by his legal representative is time-barred. We have heard a long argument on this point, and it has been contended that he was not bound to do more than defend the respondent's suit, as all he required was a finding on the issues framed in that suit in respect of his claims. But, with respect, I think that irrelevant. We have not to consider whether he could or could not have obtained a declaration in the respondent's suit, but whether he could have maintained a suit of his own. As to this I feel no doubt. Had he filed a suit and pleaded that the property was withheld by the District Judge until some claimant obtained a final decree of a civil Court, the respondent could not have pleaded that he had no cause of action. In fact he had just as good a cause of action as the respondent had for his suit, or as the appellant has for the present suit. I cannot see that after 1918 his position was in any way different from theirs. For each the cause of action was the denial of his right by the other. It accrued before the District Judge's order. Shantyanandji's denial of the respondent's right induced the District Judge to refuse him the property. And the denial by the respondent of the right of Shantyanandji induced this Court to set aside the District Judge's order and in consequence prevented him from enjoying the property. Therefore in 1918 he had as good a cause of action as had the respondent. He did not avail himself of it during the succeeding six years and in consequence I think that his right to sue became barred by Art. 120, Lim. Act. I cannot see that the decision in *Nrityamoni Dassi's* case (14) can help the present plaintiff, for Shantyanandji did not obtain satisfaction in the respondent's suit and the rule in that case refers only to persons who have in some way obtained satisfaction (see the decision in *Muthu Korakkai Chetty* v. *Madar Ammal* (21). I need not discuss this question further as I am of opinion that the plaintiff has succeeded on the first point. I agree that his appeal succeeds.

K.S. *Appeal allowed.*

A. I. R. 1933 Bombay 287

PATKAR AND BARLEE, JJ.

Fakirgowda Basangowda—Appellant.

v.

Dyamawa Gowdappagowda—Respondent.

First Appeal No. 539 of 1927, Decided on 20th December 1932, from decision of First Class Sub-Judge, Dharwar, in C. S. No. 252 of 1923.

(a) Civil P. C. (1908), S. 11—Res judicata as between co-plaintiffs—Held on facts there was no res judicata.

A father brought a suit on behalf of himself and his three minor daughters. There was no conflict between the plaintiffs inter se in that suit. Subsequently one of the daughters brought a suit against the father for partition of property got by him in the prior suit:

Held: that the suit was not barred by the original suit as the rights between the plaintiffs inter se were neither necessary nor decided in the prior suit: *AIR* 1931 *P C* 114; *AIR* 1932 *P C* 161 and 36 *Bom* 207, *Ref.* [P 289 C 1]

(b) Hindu Law—Bombay school—Nature of interest that women take in property.

According to Hindu law prevalent in the Bombay Presidency women coming into the family by marriage take a limited interest whereas women going out of the family by marriage into another family, such as daughters and sisters, take an absolute estate. [P 289 C 2; P 290 C 1]

(c) Watan Act (5 of 1886), S. 2—"Devolving by inheritance."

The words "devolving by inheritrnce" are not restricted to inheritance by way of descent. [P290 C 1]

(d) Watan Act (5 of 1886), S. 6—Daughter inheriting watan and non-watan lands—Daughter leaving daughters and husband—Husband is entitled to watan lands in preference to daughters but daughters are entitled to non-watan lands.

A daughter who had inherited watan and non-watan lands died leaving behind daughters and husband. The husband filed a suit on his own behalf and on behalf of his minor daughters for recovery of the lands and all lands were entered in his name. One of the daughters after her marriage and after attaining majority sued for partition of the lands as heir to her mother:

Held: that the watan lands descended in the family of the female watandar, that the husband was a member of such family and that he was to be preferred to the daughters.

Held further: that as regards non-watan land the daughters were entitled to succeed: *Case law referred.* [P 292 C 2; P 293 C 1]

(e) Limitation Act (1908), Art. 144—Suit by father on his own behalf and on behalf of minor daughters and consequent possession of property—Overt act on part of father is necessary to claim adverse possession as against daughter.

Where a father files a suit on his own behalf and on behalf of his daughters and recovers possession of property, in order that he may claim adverse possession of the property as against the daughters, it is necessary that there should be an overt act on his part which gives notice to the daughters that he is holding the property adversely to them: 35 *Bom* 79; 30 *Mad* 145 and *AIR* 1922 *Mad* 12, *Ref.* [P 293 C 2]

G. N. Thakor, R. A. Jahagirdar and *S. B. Jathar*—for Appellant.

H. C. Coyajee and *Nilkant Atmaram*—for Respondent.

Patkar, J.—In this case the plaintiff sues to recover by partition one-third share of the suit properties which consist of watan as well as non-watan properties mentioned in the plaint. The defendant contended first that the decision in Suit No. 1 of 1905 operated as res judicata, secondly, that the claim of the plaintiff was barred by limitation, and thirdly, that with regard to the watan lands he was the preferable heir under Bombay Act 5 of 1886. One Chanbasangauda died in 1877 leaving a widow Basava who died in 1879. They left a daughter Sankava who was married to the defendant. Sankava died in February 1902 leaving three daughters Dyamava, the plaintiff, Savantrava and Gangava. The present suit is brought by Dyamava against her father in respect of one-third share of both watan and non-watan properties which were inherited by Sankava from her parents. The learned Subordinate Judge held that the decision in Suit No. 1 of 1905 did not operate as res judicata, secondly, that the father was not entitled to preference in respect of the watan property and, thirdly, that the plaintiff's suit was within time as there was no adverse possession of the father either in respect of the watan property or non-watan property. The defendant appeals.

The first question is whether the decision in Suit No. 1 of 1905 operates as res judicata. That was a suit brought by defendant on behalf of himself and his three daughters including the plaintiff, who were minors and were represented by the defendant as their guardian, against one Basangauda who belonged to the original watan family of Chanbasangauda. In para. 3 of the plaint the defendant, who was plaintiff 1, stated that he and his daughters, who were plaintiffs 2, 3 and 4, were the heirs of the said Sankava and were enjoying the properties by virtue of their right as owners thereof. The District Judge held that prima facie the daughters, who were plaintiffs 2, 3 and 4, were heirs to their mother Sankava, and if as females, they were barred by any special enactment, their father succeeded. The decree declared that the defendant Fakirgowda, who was plaintiff 1 in that case, was a watandar and had a preferential right as between himself and the defendants to have his name registered as watandar Patil and Kulkarni of the villages named in the plaint. In Appeal No. 50 of 1907, the decree of

the lower Court was confirmed by the High Court on 13th November 1907.

It appears from the plaint that there was no conflict between the plaintiffs inter se. Plaintiff 1 alleged that he was the heir if plaintiffs 2, 3 and 4, who were his daughters, were not entitled to the property. Plaintiffs 2, 3 and 4 were minors and plaintiff 1, the present defendant before us, was the guardian of the minors. It does not appear that there was any contest as between the plaintiffs inter se. If that is so the principle of the decisions of the Privy Council in the cases of *Munni Bibi* v. *Tirloki Nath* (1) and *Maung Sein Done* v. *Ma Pan Nyun* (2), which related to a dispute between the defendants inter se would apply. The decision resulted in divesting Basangauda, who belonged to the original watan family, of any right to the watan property, but it did not decide the rights of the plaintiffs inter se. It would therefore follow that the decision in that case would not operate as res judicata as between the present plaintiff and the defendant. It also appears that it was not necessary to decide the rights between the plaintiffs inter se in that case for the purpose of granting relief against the defendant: see *Rakhmini* v. *Dhondo* (3). The appeal was filed in the High Court by the defeated defendant against the present defendant and the minor daughters, who were represented by the present defendant as their guardian. I think therefore that the previous decision does not operate as res judicata in the present litigation.

The next question is whether the plaintiff, as the daughter claiming to succeed to Sankava, is postponed to the defendant by S. 2, Bombay Act 5 of 1886. There is no doubt that on the death of Sankava her three daughters would be entitled as heirs to the watan property as well as to the non-watan property in the absence of any enactment postponing their right of inheritance. I will first deal with the watan property as the question under Bombay Act 5 of 1886 relates only to the watan property. On behalf of the appellant it is contended that after Sankava inherited the property of Chanbasangauda she went by marriage into the family of her husband, the defendant, and became a fresh stock of descent, and the inheritance therefore must be traced to Sankava, and if Bombay Act 5 of 1886 applied, the female would be postponed to the male heir of Sankava. It is contended on behalf of the respondent that if Bombay Act 5 of 1886 applied the defendant, the husband, is not entitled to be preferred to the daughter Dyamava on the ground that he did not belong to the family of Sankava, who became the acquirer of the watan, and that the member of the watan family, entitled to inherit, must be a watandar under S. 4, Watan Act, and that the word "family" includes each of the branches of the family descended from the original watandar. It is therefore contended that only the persons, who are the descendants of Sankava, are entitled to the property, and the husband of Sankava could not be said to inherit the property by descent. S. 2, Bombay Act 5 of 1886 runs as follows :

> "Every female member of a watan family other than the widow, mother or paternal grandmother of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any watan, or part thereof, or interest therein, devolving by inheritance after the date when this Act comes into force, to every male member of the family qualified to inherit such watan, or part thereof, or interest therein."

The question therefore is whether the defendant is a member of the family of Sankava who acquired the watan, and whether he is qualified to inherit such watan or part thereof or interest therein. Sankava got the property by inheritance before Bombay Act 5 of 1886 came into force. It is common ground that Sankava after she acquired the watan became a watandar and also a fresh stock of descent for purposes of inheritance. After she got the property, Bombay Act 5 of 1886 was enacted and would apply to the succession on her death. The object of Bombay Act 5 of 1886 is to prevent the property from going from the original watan family into another family. According to Hindu law prevalent in this Presidency women coming into the family by marriage take a limited interest whereas women going out of the family by marriage into another family, such as daughters and sisters, take an absolute estate. In order

1. AIR 1931 P C 114=132 I C 598=58 I A 158=53 All 103 (P C).
2. AIR 1932 P C 161=137 I C 328=59 I A 247=10 Rang 322 (P C).
3. (1912) 36 Bom 207=14 I C 466.

to prevent the property going into another family Bombay Act 5 of 1886 was enacted. The genesis of the Act together with the history of the law bearing on the point has been discussed in the case of *Hanmant* v. *Secy. of State* (4).

Apart from the decided cases, the section itself shows that the widow, the mother or the paternal grandmother are entitled to inherit watan property. A female other than the widow, mother or paternal grandmother, is postponed to a male member of the family. The widow, mother and paternal grandmother is not so postponed because the widow, mother and paternal grandmother take a limited estate and the estate would not go out of the watan family. The widow, mother and paternal grandmother are admittedly members of the watan family according to S. 2. If the contention of the respondent is accepted that a member of a watan family can only be a member if he inherits by way of descent, it is difficult to follow the language of the Act which makes a widow, mother and paternal grandmother members of the watan family, except on the hypothesis that they become members of the watan family by marriage. If a person can become a member of a watan family by marriage, the question in the present case is, which is the family to which Sankava belonged. Sankava by her marriage went into the family of the defendant and it is the defendant's family which has become the watandar family. The defendant's family is the watandar family, for the acquirer of the watan was Sankava. The words "devolving by inheritance" are not restricted to inheritance by way of descent.

The question in the present case arises in respect of the watan property which was inherited by a daughter before Bombay Act 5 of 1886 came into operation. In such a case if the daughter succeeds to the property and dies unmarried without any issue, she would remain a member of the original watan family and no difficulty would arise. If she remained unmarried and led an unchaste life and had children, then, after the enactment of Bombay Act 5 of 1886, as between her children the male would be preferred to the female. That point is covered by the decision in the case of *Balai* v. *Subba* (5). Where a daughter, who has acquired by inheritance watan property before Bombay Act 5 of 1886, marries, she must be considered to have entered by marriage the family of her husband, and her family is the family of her husband. The question therefore is whether the husband is a member of such family qualified to inherit such watan. Reference was made to the decision in the case of *Bai Laxmi* v. *Maganlal* (6), where the dictionary meaning of the word "family" was accepted for the elucidation of the point arising in that case. There the dispute was between the daughters who belonged to one branch of the family and a male member belonging to another branch of the family which was not descended from the common watandar, and it was held that as the competing male heir neither belonged to the watandar's family nor was he descended from a common progenitor, he was not a male member of the watan family who would exclude the females. In the present case we are concerned with one family and one family only and that is Sankava's family which for all practical purposes must be considered to be her husband's family, and the male member who is competing with the female member of the family belongs to the family of Sankava which is the family of her husband. I have therefore no doubt that the defendant is a member of Sankava's family, and is also qualified to inherit such watan.

The property inherited by Sankava was stridhan property and the property would go to her issue and in the absence of any issue it would go to her husband, the defendant, and in the absence of the husband to the nearest sapinda in her husband's family. The heirs to succeed to the stridhan are the heirs of the woman herself, though her heirs in the husband's family : *Manilal Rewadat* v. *Bia Rewa* (7). I think therefore that the defendant is a male member of Sankava's family qualified to inherit such watan.

The word "watandar" which occurs in S. 5, Watan Act, does not appear in S. 2, Bombay Act 5 of 1886. It is therefore unnecessary to consider the definition of

4. AIR 1930 Bom 254=129 I C 391=54 Bom 125=32 Bom L R 155.
5. AIR 1927 Bom 191=101 I C 135.
6. (1917) 41 Bom 677=42 I C 450.
7. (1892) 17 Bom 758.

"watandar" in S. 4, Watan Act, which was relied on on behalf of the respondent, that "watandar" means a person having an hereditary interest in a watan. It was contended on behalf of the respondent that "hereditary interest in a watan" means an interest which has come by inheritance by way of descent. In *Chinava* v. *Bhimangauda* (8), it was held that the expression in S. 4, "person having an hereditary interest in a watan," means a person having a present interest of an hereditary character in the watan, and that "hereditary interest" means an interest acquired by inheritance as distinguished from an interest acquired by purchase, gift or other modes of acquisition. The defendant has an interest by way of inheritance to the stridhan of Sankava. Reliance is, however, placed on the definition of the word "family" which according to S. 4 includes each of the branches of the family descended from the original watandar, and it is therefore contended that the husband is not included in that definition. The definition of the word in S. 4 is an inclusive and not exclusive definition. It does not exclude other persons who can be members of the family, and if, according to the plain reading of S. 2, the widow, mother or paternal grandmother can become a member of the watan family by marriage, it would follow that Sankava became a member of her husband's family and her family must be considered to be her husband's family. I have already observed that the dictionary meaning which was adopted in *Bai Laxmi* v. *Maganlal* (6), was for the purposes of that case. One of the dictionary meanings of the word "family" signified "those descended (really or putatively) from the common progenitor." Another dictionary meaning of the word "family" is the collective body of persons who live in one house and under one head or manager, or a household including parents and children and the household would not exclude the husband. It has been held that the word "family" is used in its ordinary meaning according to the decisions in *Bai Laxmi* v. *Maganlal* (6) and *Balai* v. *Subba* (5).

As observed in *Bai Laxmi's* case (6), the original watandar is the source of title to succession or services according to the scheme of the Act and also S. 53 of the Act. The male member under S. 2, Bombay Act 5 of 1886, must either be a member of the family of the watandar or a person descended from a common progenitor who was the original watandar. In *Bai Laxmi's* case (6) Jamietram and his sons, the plaintiffs in that case, were not members of the family of Dinanath, therefore it was necessary to consider whether they were descended from a common progenitor Gopinath whose name appeared in the watan register and it was found that they were not so descended. In the present case the defendant is a member of the family of Sankava, the acquirer of the watan, because Sankava has no family except the family of her husband which she entered by marriage. Having regard to the watan character of the property it is unnecessary to go into the question whether Sankava could have made a gift or bequest of the property inherited by her without the consent of her husband. In the case of any property inherited by a daughter from her parents, it would be her stridhan but not of saudayik character, and she would not be able to dispose of it without the consent of her husband; see *Bhau* v. *Raghunath* (9). It is therefore difficult to hold that the defendant is not the member of the family which Sankava entered by marriage. In *Rahimkhan* v. *Fatu Bibi* (10) a watan having devolved on the widow and daughter of a deceased Mahomedan as his heirs, and each having become owner of her share in it, in so far as a watan can be held in ownership, it was held that on the death of the widow in 1890, having no qualified male heirs, the daughter was entitled to succeed as her heir. In the judgment in that case it was observed that on the death of Aisha her heirs were entitled to succeed, males probably in preference to females, but the point under consideration did not arise for decision. The point was however considered in *Hanmant* v. *Secy. of State* (4), where it was held that the watan which was inherited by the daughter was an absolute estate and the inheritance would be traced to her as she became a fresh stock of descent, i. e., a

8. (1896) 21 Bom 787.

9. (1905) 30 Bom 229=7 Bom L R 936.
10. (1895) 21 Bom 118.

fresh source of devolution. In the judgments in that case the family of Huchava was considered as the family of her husband Bhimbhat, and it was observed as follows (p. 165 *of* 32 *Bom. L. R.*) :

"The property being the stridhan of Huchava, her heirs would be first, her daughters, then daughter's daughters and daughter's sons, sons and son's sons, and in the absence of any issue her stridhan would pass, if married in an approved form, to her husband and her husband's heirs, i. e., those who are nearest to her in her husband's family, and if she was married in an unapproved form, to her parents and those who are nearer to her in her father's family."

It was unnecessary to go into the question as to priority between daughters and sons according to Mitakshara and Mayukha as regards non-technical stridhan. In that case the conflict was eventually between one daughter and the sons of a deceased daughter. So far as the competing member of the original family was concerned, his rights were negatived. But so far as the inheritance to Huchava was concerned, the heirs were considered as among the family of Huchava's husband, Bhimbhat. It is pertinent to observe that in *Hanmant's* case (4) reliance was placed on the decision in *Chanbasangauda* v. *Fakirgauda* (11), which confirmed the decision of the District Judge, Ex. 29, and which is relied on as operating as res judicata between the parties to the present suit. I think therefore that under Bombay Act 5 of 1886, S. 2, the daughters are postponed to the father, the defendant, so far as the watan property is concerned. The plaintiff's suit therefore with regard to the watan property must be dismissed.

The suit of the plaintiff with regard to the watan property having been dismissed, it is unnecessary to go into the question of adverse possession of the defendant so far as the watan property is concerned. The last question is whether the plaintiff's claim with regard to the non-watan property is barred by limitation. It is contended on behalf of the appellant that the plaintiff's claim is time-barred, for in the year 1902, in the application, Ex. 195, the defendant applied for his name being brought on the record. But it appears that in that application he did not deny the right of the daughters. On the other hand, he stated in that application as follows:

"The Khata and rights should be transferred to my name. If they cannot be transferred to my name they should be transferred to the name of my eldest daughter Dyamava."

The litigation of 1905 was conducted by the defendant in his own right and also as guardian of his daughters. There was no conflict between the defendant and his daughters in that litigation. Reliance is placed on behalf of the appellant on an application, Ex. 200, dated 14th March 1310, and an order, Ex. 34, dated 25th May 1910, which resulted in the transfer of all the lands including non-watan lands to the name of the defendant, and it is contended on behalf of the appellant that his possession was adverse since that date. It is further contended that the plaintiff's husband knew of the litigation, and the defendant had been all along paying assessment and taking rents of the non-watan property, and the possession of the defendant was adverse at least from 25th May 1910. It appears that Dyamava was born in 1896. She was married in 1910, some time after the order, Ex. 34, of 25th May 1910, and she attained majority in 1914, and the present suit was brought on 25th June 1923. It is therefore contended on behalf of the respondent that during the previous litigation and the revenue inquiries even if the defendant set up an adverse right in himself, he was also the guardian of the minors including the present plaintiff, and whatever he did or said could not be adverse to the minors unless his adverse right was brought to the knowledge of the minors including the plaintiff after they attained majority.

On the other hand, it is contended that after the marriage the guardianship of the father came to an end and the husband became the guardian of the plaintiff and the suit ought to have been brought within twelve years from 1910. It appears however from the deposition of the defendant that he admitted that he was the guardian of the three daughters till they came of age, and he acted for them in the heirship inquiry. In his first application he applied that the property of Sankava should be entered in his name, and if not in his, then in the names of his daughter. In the litigation he figured

11. F A No. 50 of 1907 decided on 13th Nov. 1907 by Chandavarkar and Heaton, JJ.

as the next friend of the three daughters. He also admitted that he had no documents to show that in any Revenue or civil Court he asserted his heirship and that the daughters were not entitled to the heirship or that any inquiry was made on that assertion of his. He had no evidence to show that he ever asserted his title to his wife's property adversely to his daughters. He also admitted that he was in possession and enjoyment of the property as he was before Sankava's death. In *Vasudeo Atmaram* v. *Eknath Balkrishna* (2) it was observed as follows (p. 89):

> "But the law is, as pointed out by Lord Hardwicke in *Morgan* v. *Morgan* (13), where any person, whether a father or a stranger, enters upon the estate of an infant, and continues the possession, this Court will consider such person entering as a guardian to the infant :" (see other decisions to the same effect collated in the notes to the case of *Taylor* v. *Horde* (14). Ambu's possession must therefore be deemed to have begun as that of bailiff or agent for the minors and to have continued as such until, after the minors had arrived at the age of majority, she did something to convert it into a wrongful possession on her own account."

A similar view was taken in *Sriramulu Naidu* v. *Andalammal* (15). The facts of the present case are adjacent to the facts in the case of *Wall* v. *Stanwick* (16), where it was held that though on the daughter's marriage the right to receive the rents passed to the husband, this did not change the character of the mother's possession. The presumption is that the possession of the guardian is on behalf of the infant, and it continues in the same character unless something is done to change the character of such possession. See: In re *Hobbs. Hobbs* v. *Wade* (17). A distinction has to be drawn between the possession of a father as the guardian of the minors and the possession of a stranger between whom and the minor there is no antecedent relationship. The question has been discussed in *Seetaramaraju* v. *Subbaraju* (18), in which the English law has been discussed, including the case of *Thomas* v. *Thomas* (19), where it was held that where a father entered upon the estate of his infant children the presumption was that he entered as their guardian and bailiff and that limitation would not begin to run against the children until they attained twenty one. The question in the present case is whether the defendant has established his adverse possession under Art. 144, Lim. Act. The applications and the orders that were made in 1910 were at a time when the defendant was the guardian of the present plaintiff. Till the plaintiff was married in 1910, she was living with her father, the defendant who was her guardian. After the order the plaintiff was married. She attained majority in 1914, within 12 years before suit, and there is no evidence in the case to show that after the plaintiff was married or attained majority there was anything done by the defendant in order to give her or her husband notice that he was holding adversely to the present plaintiff till six years before suit when there was an altercation between the plaintiff and the defendant. The learned Subordinate Judge was of opinion that the original trusteeship might very easily have changed into nominal tenancy, and believed the evidence on behalf of the plaintiff that the land was let to the defendant and she received rents and profits of the land occasionally. It appears from the evidence that she went back to her father's place and resided there for an year or two. Even if the evidence which has been believed by the learned Judge be discarded, I think the evidence on the record fails to show that there was any overt act after the marriage of the plaintiff and before she attained majority, which gave her clear notice that her father was holding adversely to her. The plaintiff attained majority within 12 years before suit. In these circumstances I think the contention of the defendant that he acquired adverse possession with regard to the non-watan lands must fail.

The result therefore is that the decree of the lower Court will be varied by dismissing the plaintiff's suit with regard to the watan lands, namely, items 2, 4, 5, 6 and 7 in Sch. A. The rest of the claim will have to be allowed. The

12. (1911) 35 Bom 79=8 I C 639.
13. (1737) 1 A T K 489.
14. 2 Sm. L C 644.
15. (1906) 30 Mad 145=17 M L J 14.
16. (1887) 34 Ch D 763=56 L J Ch 501=35 W R 701=56 L T 309.
17. (1887) 36 Ch D 553=57 L J Ch 184=36 W R 445=58 L T 9.
18. AIR 1922 Mad 12=70 I C 678=45 Mad 361.
19. (1855) 2 K & J 79=4 W R 135=1 Jur (n s) 1160=25 L J Ch 159.

defendants must give to the plaintiff one-third share in the non-watan properties in suit after a fair and equitable partition and should pay mesne profits of the said one-third share from the date of suit till the date of delivery of possession. Enquiry as to mesne profits should be held under O. 20, R. 12. We set aside the order with regard to interest on mesne profits and also interest on costs. Cost must follow the event. The order will be costs in porportion throughout.

Barlee, J.—I agree. The plaintiff sued as one of the three daughters of Sankava, deceased, for her one-third share of her mother's property. Sankava was the daughter of a watandar called Chanbasangauda who died in 1877 leaving a widow who succeeded him and died in 1879. On the death of the widow Sankava succeeded to the watan property. That was before the Act of 1886 when there was no bar to the succession of a woman. She was married to the appellant, Fakirgowda, by whom she had three daughters. She died in 1902 leaving her surviving her husband, and her three minor daughters of whom the eldest, the present plaintiff Dyamava, was only six years old. The father applied to have his name entered as heir to both the watan and non-watan properties, which had belonged to his wife, and in the alternative for the name of the eldest daughter Dyamava to be entered. Dyamava's name was entered to the non-watan property but the name of a member of the original watan family, that is Chanbasangauda's family, was entered for the watan property. The father therefore sued and joined with him, as co-plaintiffs, his three minor daughters. The suit was No. 1 of 1905. He was successful, and the District Judge made a decree in his favour that he was entitled to be entered as the watandar. On the strength of this decree he applied in 1910 to have his name entered instead of his daughter's name to the non-watan properties. Now all this time he was not only a claimant to his wife's estate but the guardian of his three minor daughters. In 1910 the eldest girl, the present plaintiff, was married, some time after the last application, which I have mentioned, by which the defendant had his name substituted for hers, and she went to live at the village called Harti in the Gadag taluka, which, we are told, is about 100 miles from Ranebennur where the watan property is situated and where her father was and is living. From that day up to 1922 there was no dispute between her and her father. There is no evidence worth the name that she ever received any profits of the properties. I agree with my learned brother that the evidence, which she brought at the trial of this suit of receipt of profits is worthless. In 1922 admittedly there were disputes, and on 15th June 1923, she filed this suit to get a one-third share.

The important questions we have to decide are whether she is the rightful heir of the watan properties or whether her father is the rightful heir under the watan law, and secondly, in view of the fact that the daughters were heirs of the non-watan property, whether the father has acquired title by adverse possession. The law as regards the succession to watan property is contained in Bombay Act 5 of 1886 which was passed to amend Bombay Act 3 of 1874, the Hereditary Offices Act, to prevent watan property from leaving the watan family. With that object it provided that every female member of the watan family other than the widow, mother or paternal grandmother (the female heirs who take a limited estate) of the last male owner shall be postponed in the order of succession to any watan to every male member of the family qualified to inherit such watan. Now, according to the decision of the District Court in Civil Suit No. 1 of 1905, which was confirmed by this Court and has since been approved in *Hanmant* v. *Secy. of State* (4), when Sankava succeeded to the watan property it left the family of the original watandar Chanbasangauda, and the watan family is therefore the family of Sankava, the deceased, who became a watandar because she had legally acquired the watan property subsequent to the introduction of the British rule. The defendant claims that he is the only male member of his wife's family and that his daughter must be postponed to him in the succession. The other side denies that he is the member of his wife's family, and, secondly, denies that he is a qualified member. Now, it is difficult to hold that the husband

and wife belong to different families. In fact, the argument on behalf of the plaintiff in this connexion goes too far. If only the members of Sankava's family can succeed to her, the plaintiff herself certainly cannot succeed, because it is beyond doubt that a daughter belongs to the family of her father. It is impossible to say that a husband and wife belong to two different families. They belong to the same family and it is just as correct to say that a husband belongs to his wife's family as that a wife belongs to her husband's family.

Then the question comes whether Fakirgowda is qualified, and it is suggested by Mr. Coyajee and Mr. Nilkant, who have argued the case for the plaintiff, that only those persons are qualified who are the descendants of the original watandar. This argument is based on the definition of "family" which is given in S. 4 of the Act and runs, "'family' includes each of the branches of the family descended from an original watandar." It is contended that the family of an original watandar includes none but his or her descendants. But I am unable to accept this view. The definition is an inclusive one. It says that the branches of the family descended from the original watandar are to be included in the watan family; it does not say that the family of the original watandar himself is to be excluded. I am unable then to agree with the learned advocates when they argue that the husband of the deceased lady does not belong to her family or that he is not qualified to succeed to her and to the watan estate.

The appeal therefore succeeds as regards the watan property. The other question of importance is whether the father has obtained a good title by adverse possession. The suit was filed, as I have said, on 15th June 1923, and therefore, he had to show that his possession became adverse before 15th June 1911. Mr. Thakor relied on various adverse acts done by his client prior to 1910. He distinguishes the cases such as those of *Vasudev Atmaram Joshi* v. *Eknath Balkrishna Thite* (12) and *Sriramulu Naidu* v. *Andalammal* (15), by saying that the father did not enter on the property as guardian but all along was claiming as heir and entered on his own behalf. This may be conceded, because apparently he was in possession at the time of his wife's death, and after his wife's death he claimed to be her heir. Nevertheless, he had a dual capacity. He was not only a claimant but was at the same time the guardian of his minor daughters, and he continued to be and to act as their guardian up to the date of the marriage of Dyamava, and after that date he was the guardian of the other daughter. I am unable to agree, then, that any acts done by him in the years 1902 to 1910 can be reckoned as adverse in the sense that they were overt acts of adverse possession.

Next, for the purposes of this case we can assume that Dyamava got married some time about the middle of 1910. She had a daughter born at the end of 1911, so it appears safe to accept 1910 as the year of her marriage. Therefore we have a period between the middle of 1910 and the middle of 1911, that is the date which I have mentioned as within 12 years before the suit, during which period some adverse act must be shown, and no definite overt act is alleged to have been done during this period. Mr. Thakor has to fall back on the negative conduct of his client in not sending the produce of the land or any profits of the property to Dyamava or her husband during this period. I agree with my learned brother that we cannot say that the mere non-receipt of profits for that period amounted to a notice to Dyamava or her husband that her father was claiming the property adversely to her. We must remember that the property was at Ranebennur about 100 miles from Harti and that after he ceased to be the guardian of his daughter Dyamava, he was still the guardian of the other daughter and the natural manager of the property. It was quite natural, then, that he should remain in management and, though the failure to send profits for a very considerable period might amount to notice, I do not think that the period was long enough in this case. Mr. Thakor relies also on the fact that her husband knew at the time of the marriage of the decision in the Suit No. 1 of 1905. That is admitted, but the decision in the suit of 1905 referred to the watan property and not to the property with which we are now concerned.

Lastly, the learned counsel has laid stress on the fact that the uncle of the plaintiff's husband attested an endorse-

ment on a document on behalf of Fakirgowda, the father. In 1904 the latter had mortgaged some of these properties as belonging to himself and in 1913 he paid off the mortgage, and the endorsement of payment was attested by an uncle of Dyamava's husband. But apart from the fact that this attestation took place outside our period, i. e., within 12 years, it is difficult to hold that a man has notice of the contents of a document which he attests in this manner. For these reasons I agree with my learned brother that the defence of adverse possession has not been made out, and that the appeal must fail to this extent.

K S. *Appeal partly allowed.*

A. I. R. 1933 Bombay 296

BEAUMONT, C. J. AND BAKER, J.

Poona City Municipality—Applicant.

v.

R. N. Paranjpe and Sons. — Opponents.

Civil Revn. Appln. No. 185 of 1931, Decided on 19th January 1933, against decree of Small Cause Court Judge, Poona in Civil Suit No. 5235 of 1929.

Bombay Municipal Boroughs Act (18 of 1925), Ss. 99 and 203 — Municipality charging less by mistake — Suit for balance does not lie.

Unless there is a current account kept under S. 99, the provisions for payment contained in Ch. 8 do not cover an octroi payable on demand. [P 296 C 2]

The Municipality allowed big allowance in respect of octroi payable on certain goods and in consequence charged less than they were entitled to charge. They sued for the balance on finding out the mistake. No current account was proved to be kept under S. 99:

Held : that S. 203 did not apply and that the suit did not lie. [P 297 C 1 ; P 298 C 1]

W. B. Pradhan—for Applicant.

B. N. Gokhale for *G. B. Chitale* — for Opponents.

Beaumont, C. J. — This is an application to the Court to review an order made by the Small Cause Court Judge of Poona. The plaintiffs, who are the Municipality of Poona City, are suing to recover a sum of Rs. 34-8-0 which they say is due to them in respect of octroi on certain goods which belonged to the defendants. It appears that the plaintiffs purchased certain chemicals in casks from the defendants and they delivered to the defendants a bill in respect of the octroi payable on those chemicals making an allowance in respect of the weight of the casks, but by an error too big an allowance was made ; that is to say, the weight of the casks was inaccurately ascertained, and in the result the plaintiffs charged octroi less by this sum of Rupees 34-8-0 than they were entitled to charge, and they sue the defendants for the balance. The learned Small Cause Court Judge held that the suit did not lie, and we are asked to review that order.

In my opinion the learned Judge was right in holding that the suit does not lie. The question turns on the construction of S. 203, Bombay Municipal Boroughs Act, 1925. To appreciate that section it is necessary to look at a few of the earlier section. S. 73 gives a right to the Municipality to charge an octroi on animals or goods brought within the octroi limits. S. 98 provides that in case of non-payment on demand of any octroi leviable by a Municipality, any person appointed to collect such octroi may seize the goods, and then power is given to sell the goods. S. 99 provides that the standing committee if it thinks fit instead of requiring payment of octroi due from any person, mercantile firm or public body, to be made at the time when the animals or goods in respect of which the octroi is leviable are introduced within the octroi limits of the Municipal borough, may at any time direct that an account current shall be kept on behalf of the Municipality of the octroi so due from such person, firm or body ; and then it is provided that any amount due on the current account shall for the purposes of Ch. 8 be deemed to be and shall be recoverable in the same manner as an amount claimed on account of any tax recoverable under the said chapter. Then Ch. 8 deals with the recovery of various taxes, but having regard to S. (1) (b) the chapter does not apply in respect of a sum leviable under sub-S. (1), S. 98, or payable on demand on account of an octroi. So the result is that unless there is a current account kept under S. 99 the provisions for payment contained in Ch. 8 do not cover an octroi payable on demand. Then S. 203, which is the one relied on by the plaintiffs as entitling them to sue, reads as follows :

"In lieu of any process of recovery allowed by or under this Act or in case of failure to realize by such process the whole or any part of any amount recoverable under the provisions of Ch. 8 or of any compensation, expenses, charges or damages payable under this Act, it shall be law-

ful for a Municipality to sue in any Court of competent jurisdiction the person liable to pay the same."

The only jurisdiction to sue given to the Municipality by that section is to sue a person liable to pay, and, as far as I can see, there is no liability imposed on these defendants to pay any octroi since the Municipality have failed to prove that a current account was kept under S. 99, and that therefore the powers of recovery conferred by Ch. 8 apply in this case. That being so, I think the learned Judge was right in holding that S. 203 does not apply, and in the absence of any statutory authority to that effect it seems to me that there is no right in the Municipality to sue to recover this sum. That being so, I think we must decline to interfere with the learned Judge's order and dismiss the application with costs.

Baker, J.—I agree.

K.S. *Application dismissed.*

A. I. R. 1933 Bombay 297

RANGNEKAR, J.

Shridhar Vaman Joshi and *others*—Plaintiffs—Appellants.

v.

Ramchandra Narayan and *others*—Defendants—Respondents.

Second Appeal No. 643 of 1927, Decided on 9th January 1933, from decision of Asst. Judge, Poona, in Appeal No. 42 of 1926.

Dekkhan Agriculturists' Relief Act (17 of 1879), Ss. 12, 13 and 71-A—Court cannot award more than agreed interest—Power to award reasonable interest should be exercised to benefit of debtor.

Sections 12 and 13 read with S. 71-A, clearly show that in the first place the Court has to award interest at the rate agreed upon, unless the Court considers it to be unreasonable. If the Court finds that the rate agreed upon is unreasonable, then it should award interest at a reasonable rate, that is the rate which is generally known as the mercantile rate of interest. The Court cannot award to the creditor anything more than he bargains for. The power to award reasonable interest in spite of the agreement between the parties is to be exercised for the benefit of the agriculturist debtor and cannot be used to enhance the rate agreed upon between the agriculturist and his creditor. [P 297 C 2; P 298 C 1]

K. V. Joshi—for Appellants.

V. D. Limaye—for Respondents.

Judgment.—This appeal arises in a suit for redemption filed by several persons, most of whom were agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act, against the representatives of their mortgagee. It is common ground that the suit is governed by the provisions of the Dekkhan Agriculturists' Relief Act, and both the lower Courts have proceeded on that footing. Accounts were taken by the trial Court, and in appeal the judgment of that Court was substantially confirmed.

In second appeal the only point taken by Mr. Joshi on behalf of the appellants-plaintiffs is that the lower Courts were wrong in allowing interest at 12 per cent. on the mortgage amount to the mortgagees. By the mortgage bond the ancestors of the plaintiffs mortgaged certain property for Rs. 201, and it was agreed that the amount should be repaid after 25 years. Half of this amount, i. e., Rs. 101, was not to bear any interest, but the mortgagee was to be in possession of the mortgaged property and take the profits in lieu of interest on this part of the mortgage amount. The other half of the mortgage amount was to bear interest, but it appears that actually only Rs. 76 were paid, and not the full amount of Rs. 101. The interest agreed upon was six per cent. This suit was filed in 1922. Both the Courts after setting aside the agreement of the parties in accordance with Ss. 12 and 13, Dekkhan Agriculturists' Relief Act, have allowed 12 per cent. interest on Rs. 176 to the mortgagee, on the ground that under the provisions of the Act the Court, after setting aside the agreement, has a discretion to award such rate of interest as the Court may consider to be reasonable. They have referred to certain circumstances which are peculiar to the case as supporting their opinion that in this case the rate of six per cent. should be increased to 12 per cent. Now undoubtedly under the provisions of Ss. 12 and 13 of the Act the Court has, after setting aside the agreement between the parties, a discretion to award a reasonable rate of interest. But that does not mean that where parties have agreed upon the rate of interest, viz., six per cent, the Courts can increase the rate. The power to award reasonable interest in spite of the agreement between the parties is to be exercised for the benefit of the agriculturist debtor and cannot be used to enhance the rate agreed upon between the agriculturist and his creditor. This is clear from Ss. 12 and 13 of the Act,

read with S. 71-A, and the preamble of the Act. S. 13, Cl. (e), runs as follows:

"in the account of interest there shall be debited to the debtor, monthly, simple interest on the balance of principal for the time being outstanding, at the rate allowed by the Court as hereinafter provided:" . . .

Section 71-A, runs as follows:

"In taking an account under S. 13 or any suit under this Act where interest is chargeable, such interest shall be awarded at the following rates: . . . (a) "the rate, if any, agreed upon between the parties or the person (if any) through whom they claim, unless such rate is deemed by the Court to be unreasonable;"

The latter section shows that in the first place the Court has to award interest at the rate agreed upon, unless the Court considers it to be unreasonable. If the Court finds that the rate agreed upon is unreasonable, then it should award interest at a reasonable rate. It is difficult to see how this provision can authorize the Court to enhance the rate agreed upon. The Act was passed, as the preamble shows, to "relieve" the agriculturist and in his interest. What these provisions contemplate is that in cases where the Court finds that the interest charged is unreasonable or extortionate or oppressive, it should substitute a reasonable rate of interest, that is the rate which is generally known as the mercantile rate of interest. It is difficult to see how a Court can award to the creditor anything more than he bargains for. In this view the decree made by the lower appellate Court must be set aside and the case remanded to that Court with a direction to have the accounts taken either by itself or by a Court subordinate to it after calculating the interest at six per cent. on Rs. 176 which the Courts have found as the amount advanced under the mortgage deed. Costs will be costs in the cause.

K.S. *Order set aside.*

A. I. R. 1933 Bombay 298

RANGNEKAR AND BROOMFIELD, JJ.

Manekchand Ramchand and *others*—Defendants—Appellants.

v.

Ganeshlal Goverdhan—Plaintiff—Respondent.

First Appeal No. 63 of 1930, Decided on 27th January 1933, from decision of First Class Sub-Judge, Sholapur.

(a) Transfer of Property Act (1882), Ss. 4, 58, 59 and 100—Position of charge and mortgage as regards registration is different—Registration Act (1908), S. 17.

The position in the case of a charge within the meaning of S. 100, T. P. Act, as to the requirements of registration or attestation is different from that in the case of a mortgage under the same Act. Obviously S. 4 would then have nothing to do with the question, and when the charge is incorporated in or created by the decree, it would be valid even if unregistered under proviso to S. 17, Registration Act. [P 299 C 2]

(b) Words and Phrases—Taran.

The word "taran" is ordinarily understood to signify a charge rather than a mortgage. [P 299 C 2]

(c) Dekkhan Agriculturists' Relief Act (17 or 1879), S. 22—"Mortgage" in S. 22 is not used in strict sense as in T. P. Act—It includes charge also.

The word "mortgage" in S. 22 is not used in the strict sense of a mortgage within the meaning of Transfer of Property Act, but is used to describe not only what would technically be a mortgage, but also a charge, for the re-payment of a debt on the property of the debtor. [P 300 C 1]

(d) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 22—Whether mortgage of charge should be antecedent to decree for application of S. 22—*Quaere*.

Quaere—Whether S. 22 should apply only in cases where the mortgage or a charge created is antecedent to decree relating to debt. [P 300 C 2]

(e) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 22—Charge created under compromise deed not registered—Decree passed in accordance with compromise—Charge can be enforced—Registration Act (1908), S. 17 (2) (vi).

A charge over property of agriculturist was created under a compromise deed which was unregistered but a decree was passed in accordance with the compromise :

Held : that the charge could be enforced under S. 22 : *AIR* 1919 *PC* 79 ; 22 *Mad* 508 (*PC*) and 26 *Bom* 33, *Ref.* [P 301 C 2]

(f) Decree—Execution— Compromise presented to Court for being recorded—No objection raised and no appeal filed from order recording compromise or from decree passed in accordance with compromise—Legality of compromise cannot be questioned at time of execution of decree— Civil P. C. (1908), O. 23, R. 1.

When no objection is raised when a compromise is presented for being recorded and no appeal is filed from the order recording the compromise or from the decree passed in accordance with the compromise, the legality of the compromise cannot be questioned at the time of execution of the decree. [P 301 C 2]

G. N. Thakor and *H. V. Devatia*—for Appellants.

V. D. Limaye—for Respondent.

Rangnekar, J.—The real question in this appeal is whether the judgment-creditor, who is the respondent here, is entitled to bring the properties of the judgment-debtors, the appellants, to sale. The question arises this way. The

respondent brought a suit on a money claim against the appellants, who were traders, to recover a sum of Rs. 6,199. Pending the suit the parties arrived at a compromise, under which the respondent agreed to accept a sum of Rs. 5,000 payable by certain instalments. It was further agreed as follows :

"The properties mentioned in the application, Ex. 6 in the suit, are to be security for the said sum of Rs. 5,000, they being considered as mortgaged. The said properties are to remain as security until payment of the moneys. In default of the payment of any one instalment by the defendants, plaintiff do recover the whole of the amount then due, by the sale of the properties mentioned in Ex. 6. Plaintiff has given remission to the defendants of the rest of the claim and the amount of the costs."

This compromise was submitted to the Court and was recorded and in accordance therewith a decree under O. 23, R. 3, was made. This decree was acted upon, and the appellants paid the amount of the first instalment. On default of the payment of the second instalment the decree-holder instituted proceedings to carry out the decree, and it is out of these proceedings that the present appeal arises. The appellants contended that as they were agriculturists the property was not liable to be sold under S. 22, Dekkhan Agriculturists' Relief Act. Their case was that there was no valid mortgage, as the compromise was not registered or attested, nor was the decree, as required by the Registration Act read with Ss. 4, 58 and 59, T. P. Act. The learned First Class Subordinate Judge held in effect that the lands were specifically mortgaged to secure the repayment of the debt to which the decree related and that the case fell within the provisions of S. 22, Dekkhan Agriculturists' Relief Act. He accordingly made an order for sale of the properties.

The learned counsel for the appellants has raised the following points :—(1) S. 22, Dekkhan Agriculturists' Relief Act, applies only to a case of a specific mortgage and not to a charge. (2) The compromise and the decree were not registered nor attested as required by the Registration Act and the Transfer of Property Act. (3) If it be held that the section is applicable to the case of a charge, the decree created a mortgage and not a charge. (4) The property could not be brought to sale in any event in execution proceedings. This contention however was not developed nor was pressed, and is, in my opinion, unsustainable on the authorities. (5) On a true and proper construction of S. 22 the case did not fall within the section, as the mortgage or the charge was not created before the decree but by the decree itself, and that the section, even if it be construed to include the case of a charge, would not apply when the mortgage or the charge was created for the first time by the decree itself. It may be stated that this point came up for discussion for the first time during the hearing. It was conceded by the learned counsel for the appellants that if on the construction of the decree it was held that the transaction was one of charge and not of mortgage, no question of want of registration or attestation would arise. That must be so, because the position in the case of a charge within the meaning of S. 100, T. P. Act, as to the requirements of registration or attestation is different from that in the case of a mortgage under the same Act. Obviously S. 4 would then have nothing to do with the question, and the charge being incorporated in or created by the decree, it would be valid even if unregistered under proviso to S. 17, Registration Act. The points, then, which, survive are : (a) does the decree create a mortgage or a charge ; (b) does S. 22 apply to the case of a "specific charge," and (c) does it apply when either the mortgage or the charge was not antecedent to the decree but was created by the decree itself ? I will deal with these points in order. The learned First Class Subordinate Judge has, as I have stated, held in effect that the decree creates a charge. After discussing the question as to whether the word "mortgage" in S. 22 includes a charge or not, the learned Judge observes as follows :

"Therefore if the clauses in the compromise be held to amount to only a charge, I hold that the plaintiff is entitled to the remedy by sale as claimed."

I agree with the Judge. I have read the decree in the vernacular, and, in my judgment, the compromise as well as the decree in which the compromise was incorporated created a charge on the property of the judgment-debtors and that the transaction did not amount to a mortgage within the meaning of the

Transfer of Property Act. The material sentence is as follows: "yâ rakames dâvyanteel milkatee gahân samajoon târan âhet." The word "taran" is ordinarily understood, as far as I know, to signify a charge rather than a mortgage. If, for instance, the wording had been that the properties were to be considered as security for the sum and were given "taran gahan," the position might have been different. But on the language here the transaction falls short of a mortgage and the language shows that the properties were charged with the payment of the debt.

The next question is whether the term "mortgage" in S. 22 would include a "charge." The learned Judge held that it would, and I am inclined to agree with him. Speaking for myself, the question is not free from doubt. But on a careful consideration of the arguments I think the word "mortgage" in S. 22 is not used in the strict sense of a mortgage within the meaning of the Transfer of Property Act but is used to describe not only what would technically be a mortgage, but also a charge, for the repayment of a debt on the property of the debtor. The Dekkhan Agriculturists' Relief Act was enacted in 1879. The distinction between a "mortgage" and a "charge" as is now known to us was made for the first time by the Transfer of Property Act. This Act was enacted in 1882 and S. 58 defining a mortgage was extended to this Presidency in 1893. I have no doubt, as observed in *Girwar Singh* v. *Thakur Narain Singh* (1), that in the old days these terms were used interchangeably. In this connexion I may refer to two sections of the Act. Mr. Divatia referred to one of them, and that is S. 70, in support of his argument. In that section both the words "mortgage" and "charge" are used. On the other hand, S. 56 seems to show that the word "charge" used there would include a mortgage, and it is difficult to understand the omission of a mortgage from that section, except on the hypothesis that the terms were used interchangeably in the days when the Dekkhan Agriculturists' Relief Act came to be placed on the statute book. The result of holding otherwise would be to deprive the agriculturist of the benefit of, say for instance, S. 11-A or S. 11 or S. 12, Dekkhan Agriculturists' Relief Act, in cases where he has created only a charge over his property to secure the payment of his debt. The next question is whether under S. 22 the mortgage or the charge must be antecedent to the decree. The relevant portion of the section is in these terms:

> "Immovable property belonging to an agriculturist shall not be attached or sold in execution of any decree or order passed whether before or after this Act comes into force, unless it has been specifically mortgaged for the repayment of the debt to which such decree or order relates, and the security still subsists."

The difficulty of a logical construction of the provisions of the Dekkhan Agriculturists' Relief Act is almost proverbial, and, speaking for myself, I think, if the legislature intended that S. 22 should apply only in cases where the lands were mortgaged or charged prior to the decree relating to the debt and that it should not apply where a charge or a mortgage was created by the decree itself for the first time, the actual language used is somewhat unfortunate. But in view of the facts of this case it is not necessary for me to express any opinion on the question raised. The learned counsel for the respondent argues that even if the section is construed to refer only to the case of a mortgage or charge prior to the decree, there is no difficulty in his way as the charge was created before the decree under the compromise deed. Mr. Divatia contended that the compromise deed could not be looked at as it is unregistered. Now it seems to me that the answer to Mr. Divatia's objection is found clearly in *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (2). In this case a decree was passed in accordance with a compromise arrived at between the parties to a suit. The petition setting out the terms of the compromise was recited in full in the decree. One of the terms related to some lands which were not in the suit. In a subsequent suit to enforce the decree, their Lordships held that the agreement purported to create a contingent interest in the land and required registration under S. 17 (1) (b), but the agreement being incorporated in the decree it was not necessary to register it by reason of S. 17 (2) (vi). The next question considered

1. (1887) 14 Cal 730 (F B).

2. AIR 1919 P C 79=53 I C 534=46 I A 240=47 Cal 485 (P C).

by the Board was whether it fell within that sub-section and whether it was saved by reason of the proviso 6. Their Lordships were of opinion that it was. That is precisely the position here. Lord Buckmaster on the point observed as follows (p. 246):

"This in fact is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents."

In support of this opinion Lord Buckmaster referred to *Pranal Annee* v. *Lakshmi Annee* (3). That was a suit for possession of certain land. It was compromised by two documents, one being a rajinama and the other an agreement of union. This latter related to lands in suit as well as certain lands outside the ambit of the suit. The rajinama was not registered nor mentioned to the Court. Only the rajinama was produced and a decree made in accordance therewith. The effect of the agreement as to lands outside the suit was set out in the rajinama, lands outside the suit mentioned in a schedule, but the decree did not refer to the same and no order was made in regard to those lands. The parties acted on the whole agreement for some years. Then a dispute took place resulting in a suit and the question was whether the rajinama could be given in evidence. The Privy Council held that so far as the rajinama related to the lands in the first suit, it was admissible but as the order made had not in fact referred to or mentioned the terms of the compromise, the rajinama being unregistered could not be received in evidence. But in expressing their opinion Lord Watson observed (p. 106 *of* 26 *I. A.*):

"If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half-share of the lands involved in that suit, and also a half-share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute."

A similar question arose in *Balshet* v. *Dhondo* (4) and Candy, J., disposed of it in these words (p. 38):

"It is unnecessary for us to decide whether, as held by Mr. Knight, an agreement, creating a charge upon property which must have been in 1890 forthwith reduced to writing before the Conciliator under S. 43, Dekkhan Agriculturists' Relief Act, and then forwarded by the Conciliator under S. 44 to the Subordinate Judge, and then ordered to be filed, taking effect from that day as a decree of the Court, would be invalid because it was unstamped, and because it had not been written by, or under the superintendence of, the Village Registrar under S. 56, Dekkhan Agriculturists' Relief Act. As a fact, stamp duties on such documents were remitted by the Government of India in 1880."

Then his Lordship further observed:

"And there is no question here of admitting in evidence or acting upon such document. All that we are concerned with is the decretal order directing the sale of the land."

That, I think, is precisely the point in the case. It is difficult, speaking for myself, to see how the case would come under S. 49, Registration Act. It is not necessary for the respondent to go back to the compromise to show that the charge came into existence prior to the debt. There is no question here of admitting the compromise in evidence. The decree itself would be judicial evidence of the fact. Nor is the respondent relying upon the compromise deed or seeking to use it for the purpose of affecting an interest in immovable property. All that he is doing now is to enforce the decree which he obtained against the appellants.

I think therefore even if the section be construed to mean that the charge must precede the decree, the respondent is entitled to succeed as the decree shows that a charge was created before the passing of the decree. But there is another objection, in my opinion, to the point taken by Mr. Divatia. Under R. 3, O. 23, when a compromise is presented to the Court for being recorded, the parties to the compromise have an opportunity of disputing the validity or the legality of the compromise. The Court is bound to record a compromise if it is lawful. Any question which goes to the root of the matter as a question as to want of registration could have been raised by the appellants when this compromise was presented to the Court for being recorded. That was not done. The appellants could have appealed against the order recording the compro-

3. (1899) 22 Mad 508=26 I A 101=7 Sar 516 (P C).

4. (1901) 26 Bom 33=3 Bom L R 545.

mise. In any case they could have appealed from the decree which was passed in accordance with the compromise. That was not done. On the other hand, they acted upon it by paying the first instalment, and, in my opinion, it is too late for them to object to the legality of the compromise at this stage in execution proceedings and to have the matter reopened. I think therefore that the learned Subordinate Judge was right in holding that the appellants were precluded from raising the contention that the compromise was not lawful or valid. In this view I think the appeal must be dismissed with costs.

Broomfield, J.—This is an appeal from an order directing sale of the immovable property of an agriculturist in execution of a decree. The decree was based on a compromise and it ordered the defendant, who is the appellant now, to pay a certain sum of money and certain specific property was made security for the debt. The question whether the property can be sold in execution depends on whether it can be held to have been specifically mortgaged for the repayment of the debt to which the decree relates within the meaning of S. 22, Dekkhan Agriculturists' Relief Act. The learned Subordinate Judge, it appears, has not made up his mind as to whether it is a case of mortgage or a charge or as to whether the mortgage or charge, as the case may be, was created by the compromise or by the decree. But he was of opinion that in any case the land has been specifically mortgaged within the meaning of S. 22 and is therefore liable to be sold. He has accordingly directed execution to proceed. We have to construe firstly the decree and secondly the provisions of S. 22, Dekkhan Agriculturists' Relief Act. As to the construction of the decree, I propose only to say that I agree with my learned brother that the language used in the compromise which was incorporated in the decree "milkatee gâhan samajoon târan âhet," not "gahân dile," may fairly be said to indicate that the intention both of the parties and of the Court was not to create a mortgage but something less than a mortgage, that is to say, a charge according to the definition in the Transfer of Property Act. That being so, Mr. Thakor's interesting argument directed to show that the decree required to be attested and registered need not be considered.

As to the construction of S. 22, the first question is whether the Dekkhan Agriculturists' Relief Act intended to draw a distinction between a mortgage in the strict technical sense and a charge. In S. 70 no doubt both words are used. But in S.56 the word "charge" is apparently used in a sense where it would include a mortgage and it may be mentioned that the side-note to S. 22 itself uses the word "pledged" as equivalent to mortgaged. Before the Transfer of Property Act was passed no clear distinction was drawn between mortgages and charges, as was pointed out in *Girwar Singh* v. *Narain Singh* (1). On the argument addressed to us I am of opinion that the lower Court was right in holding that the words "specifically mortgaged" in S. 22 need not be construed in a technical sense and would apply to a specific charge such as we have in this case.

The next question I desire to deal with is whether S. 22 can be applied to a mortgage or charge which is created by the decree itself. For, as the compromise was not registered, I should myself find it difficult to hold that a valid charge was created before the terms of the compromise were incorporated in the decree. I think it must be admitted that if S. 22 was intended to apply to a charge created by a decree, the language cannot be regarded as being very clear or appropriate. But the language of this enactment is notoriously difficult to construe, and looking at the matter, as we must, from the point of view of the executing Court, I am not prepared to say that the property in question has not been specifically mortgaged for the repayment of the debt to which the decree relates within the meaning of the section. I accordingly agree with my learned brother that the order of the lower Court is right and the appeal fails.

K.S. *Appeal dismissed.*

A. I. R. 1933 Bombay 303

BEAUMONT, C. J.

Yellappa Yellappa Kammar—Appellant.

v.

Fakira Variyappa Barki — Respondent.

Second Appeal No. 132 of 1930, Decided on 18th January 1933, from decree of District Judge, Dharwar, in Appeal No. 54 of 1929.

Practice—Counsel refraining from calling certain witness in deference to opinion of Judge—Decree should not be reversed without allowing such witness to be examined—Evidence.

Where a counsel refrains from calling evidence in deference to some observation from the Bench, the appellate Court ought not to reverse the decree of the first Court without allowing such evidence to be given which the first Court thought unnecessary: 22 *Bom* 255, and 30 *All* 367, *Rel. on.*

Review of the above practice suggested on the ground that it is the duty of counsel to see that he calls sufficient evidence and Judges ought not to stop the parties from calling such evidence as they think proper unless the evidence is manifestly unnecessary. [P 303 C 2; P 304 C 1]

A. G. Desai—for Appellants.

R. A. Jahagirdar—for Respondent.

Judgment.—This is a second appeal from a decision of the District Judge of Dharwar, and the case is in a rather unsatisfactory position. The plaintiffs sue for an injunction to restrain the defendants from interfering with their possession of a certain piece of land, and in the alternative, if the plaintiffs are not in possession, then they ask that they may be given possession. The only issues framed in the trial were: (1) Does plaintiff prove the title of his vendor to the suit site? [This was answered in the affirmative.] (2) Does plaintiff prove his possession of the suit site? [This was also answered in the affirmative.] (3) Is he entitled to the injunction sought? [This was also answered in the affirmative.]

The defendants then appealed, and in the first instance the appeal was heard by the District Judge ex parte. The learned Judge, as I understand his judgment, disagreed with the findings of fact of the trial Judge. The trial Judge had held that the plot of land in question had belonged to a man named Fakirsab, having been purchased by him in 1875, and that it had been leased to a man named Irabasappa in 1901, and that the plaintiffs had been in possession of it from about 1904, and they had taken a conveyance of the property from Fakirsab in 1928. The appellate Court seems to accept the evidence as to the paper title, that is to say, the learned Judge agrees that the documents refer to this particular piece of land, but he disbelieves the plaintiff's evidence as to his having been in possession. Whether he accepted the defendants' evidence of adverse possession I do not know. Then an application seems to have been made to the District Judge by the plaintiff alleging that there had been some mistake in not serving him, and in the result the learned Judge set aside the ex parte decree, and re-heard the appeal, and give a second judgment dated 29th November 1929, the first judgment having been given in the preceding July. In his second judgment he comes to the same conclusion as in the first judgment, but he alludes to the fact that the plaintiff had been ready to give in the trial Court further evidence as to possession and had refrained from doing so at the instance of the Judge, and a purshis Ex. 32 was put in, which is signed, as I understand it, by the trial Judge, which says:

> "The remaining three four witnesses for plaintiff (are to be examined) on this very point, that is whether the plaint property is in the possession and vahiwat of plaintiff: they are present to-day. But as the Court says (observes) that it is not necessary (to examine them) if they are (to be examined) on this very point, the witnesses are not examined."

So apparently the plaintiff was prepared to give further evidence as to possession, and he refrained from doing so owing to an expression of opinion by the Judge that such evidence was not necessary. New I am bound to say I have myself always understood the rule to be that at a trial it is the duty of counsel to see that he calls sufficient evidence to prove his case, and if, in deference to some observation from the Bench he refrains from calling evidence, he runs the risk of the Court of appeal taking a different view from that of the trial Judge and holding that there is not sufficient evidence, and according to my understanding of the practice, at any rate in England, a re-trial would not be ordered in order to enable the plaintiff to call further evidence which he might have called at the trial but did not call owing to some expression of opinion from the Bench. In this country, however, a different rule has pre-

vailed in the case of appeals from a mofussil Court, and I have been referred to the case of *Arjun* v. *Shankar* (1), in which an appellate Bench of this Court held in circumstances similar to the present that the lower appellate Court ought not to have reversed the decree of the first Court without allowing the defendant to give the evidence which the first Court had thought unnecessary. I think, sitting here in second appeal, that I must follow that decision. There is another decision to the same effect in *Pabitra Kunwar* v. *Maharaja of Benares* (2). I would, however, observe that the practice may at some future time be the subject of review, and that Judges ought not to stop the parties from calling such evidence as they think proper unless the evidence is manifestly unnecessary. I must therefore, remand the case to the trial Court for the plaintiff's further evidence to be heard, but I think also that the issues should be extended. If the plaintiff proves possession, then of course that disposes of the matter, but if he fails to prove possession, I think there ought to be an issue as to whether he has been dispossessed, and if so, from what date, and a further issue whether if the plaintiff has not been dispossessed, the defendant proves adverse possession for more than 12 years, because at present it seems to me there is some uncertainty whether the case falls under Art. 142 or Art. 144, Limitation Act. I therefore propose to reverse the decree of the lower appellate Court and remand the case to the trial Court with directions to hear further evidence as to the plaintiff's possession, and to amend the issues as suggested, and both parties will be at liberty to call such further evidence as they think right. Costs hitherto incurred will be costs in the suit.

K.S. *Decree reversed.*

1. (1896) 22 Bom 253.
2. (1908) 30 All 367=5 A L J 468=1908 A W N 140.

A. I. R. 1933 Bombay 304

BEAUMONT, C. J. AND RANGNEKAR, J.

Amulakchand Mewaram and *others*—Plaintiffs—Appellants.

v.

Babulal Kanalal Taliwala — Defendant—Respondent.

Original Civil Appeal No. 33 of 1932, Decided on 7th March 1933.

(a) Civil P. C. (1908), O. 30, R. 1—Hindu Joint family is not firm within meaning of O. 30, R. 1.

A joint Hindu family is not a firm in the name of which proceedings may be commenced under O. 30, R. 1, Civil P. C., that rule being confined to firms of merchants carrying on business in British India. [P 305 C 1]

(b) Civil P. C. (1908), O. 1, R. 10—Amendment of name of plaintiff—When to be allowed stated.

The question whether there should be an amendment or not really turns upon whether the name in which the suit is brought in the name of a non-existent person, or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case prima facie there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs. [P 305 C 1]

(c) Civil P. C. (1908), S. 35—Costs are in discretion of Court.

Costs are always in the discretion of the Court and peculiarly so where the payment of costs is imposed as a term of amendment. [P 305 C 2]

Lalji Gokuldas—for Appellants.

Jamshed Kanga—for Respondent.

Beaumont, C. J.—This is an appeal from an order of Mirza, J., refusing leave to the plaintiffs to amend the plaint by altering the name in which they sued. The suit was commenced in 1926, and the plaintiffs are described as Amulakchand Mewaram, a firm of merchants carrying on business at Kalbadevi Road outside the Fort of Bombay. It was very early appreciated that in fact that firm is not a partnership firm, but is the name of a joint Hindu family, in which, according to the evidence, there are three members, and it was proposed in 1926 that the plaint should be amended by substituting the names of the three members of the joint family for the name of the family firm as plaintiffs. The defendant was prepared to agree to that amendment, and the terms of a consent order were actually settled, but the defendant contended that he would be entitled to the costs of amending the written statement. That contention would seem to me to have been well-founded, but the plaintiffs objected to it, and in consequence the proposed amendment was not proceeded with. The result was that the suit came on for trial in due course in 1932, and at the hearing the plaintiffs asked to be allowed to amend the plaint by substituting the names of the members of the

joint family for the name of the family firm. That amendment was clearly necessary if the suit was to proceed because a Hindu joint family is not a firm in the name of which proceedings may be commenced under O. 30, R. 1, Civil P. C., that rule being confined to firms of merchants carrying on business in British India. The learned Judge refused leave to amend and dismissed the suit, and from that order this appeal is brought.

It seems to me that the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is the name of a non-existed person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs. Now it seems to me that where you have a suit brought in the name of A. B. & Co., if it be proved that A. B. & Co. is the name of an existing firm or family consisting of certain individuals C, D and E, then the description A. B. & Co. nearly cloaks the identity of C, D and E who are before the Court under that name. If under the rules C, D and E are not allowed to sue in the name of A. B. & Co., then for the purposes of the suit the description is incorrect and must be altered. But it seems to me that in such a case the proposed alteration does not involve introducing new plaintiffs, but merely involves describing correctly, rather than incorrectly, the plaintiffs already before the Court. I think that was the basis of the decision of Crump, J., and the Court of Appeal in *Ramprasad* v. *Shrinivas* (1), though the actual decision in that case turned on the effect of the Limitation Act having regard to an amendment which had been allowed. The learned Advocate General on behalf of the respondent has relied on a decision of Blackwell, J., in *Vyankatesh Oil Mill* v. *Velmahomed* (2). I must confess that I have some difficulty in following both the reasons and the conclusions of the learned Judge in that case. It was a case of a suit brought in the name of a firm carrying on business outside British India, and therefore not justified by the terms of O. 30, Civil P. C., and the learned Judge expressed the view that the plaintiff firm was a non-existent entity. But the order which he subsequently made giving leave to amend seems inconsistent with that finding.

The learned Judge referred to the case of *Ramprasad* v. *Shrinivas* (1) and an earlier case of *Kasturchand Bahiravdas* v. *Sagarmal Shriram* (3), and expressed the view, if I understand him rightly, that those cases ought not to be followed having regard to the subsequent enactment of O. 30. I do not follow that. O. 30 authorises the bringing of a suit in a firm name in a certain class of case, and it may be that inferentially it forbids the bringing of a suit in a firm name in any other class of case. But I do not see how O. 30 can affect the question of fact, whether a suit brought in the name of a firm in a case not within O. 30 is in fact a case of misdescription of existing persons, or a case of a suit brought by a non-existent entity. That question, as I say, is one of fact, and in the present case it is proved on the evidence that the firm in whose name the suit was originally brought does describe certain existing persons. I think therefore that leave to amend ought to have been given and that we must give leave. But having regard to the very foolish conduct of the plaintiffs in not carrying the amendment through in 1926 and waiting up to the hearing, we can only give them leave on somewhat drastic terms as to costs. The plaintiffs must pay the costs up to and including the hearing and must also pay the costs of the necessary amendment of the plaint, that is their own costs and the defendant's costs of any supplemental written statement. With regard to the costs of the appeal, I should say that prima facie if leave to amend is refused and a successful appeal is brought the appellant ought to have the costs of the appeal and I do not read the decision in *Gunnaji Bhawji* v. *Makanji Khoosalchand* (4), on which the learned Advocate-Gene-

1. A I R 1925 Bom 527=90 I C 625.
2. A. I. R 1928 Bom 191=109 I C 99.
3. (1892) 17 Bom 413.
4. (1909) 34 Bom 250=3 I C 159.

1933 B/39 & 40

ral relies, as laying down any general rule to the contrary. Costs are always in the discretion of the Court, and peculiarly so where the payment of costs is imposed as a term of amendment and no doubt the particular order made by the Court in that case may have been justified on the facts of that case. In the present case also there are peculiar circumstances, because, if the plaintiffs had not been foolish in the conduct of the proceedings there never would have been any question of their amending at the hearing and no appeal would have been necessary from any adverse decision. In the circumstances we think the proper order as to the costs of the appeal will be that each party bears his own costs of the appeal. On these terms we allow the amendment asked for by the plaintiffs and set aside the order dismissing the suit.

Rangnekar, J.—I agree.

K.S. *Appeal allowed.*

A. I. R. 1933 Bombay 306

BEAUMONT, C. J.

Savant Yellappa Shahapure and *another*—Plaintiffs—Appellants.

v.

Bharmappa Nogappa Lengade — Defendant—Respondent.

Second Appeal No. 819 of 1929, Decided on 20th January 1933, from decision of Assistant Judge, Belgaum, in Appeal No. 212 of 1927.

(a) **Dekkhan Agriculturists' Relief Act (17 of 1879), Ss. 10 and 15-D — Suit under S. 15 D — Plaintiff has to prove his mortgage.**

The plaintiff suing under S. 15-D has to prove his mortgage. If the document produced is in form a sale-deed, he has to prove not only the execution of that document but that it is in fact a mortgage transaction and evidence of that can be given under S. 10. [P 306 C 2]

(b) **Dekkhan Agriculturists' Relief Act (17 of 1879), S. 15 D—Mortgage by agriculturist — Suit for account — Issue whether or not transaction was mortgage—Suit is maintainable.**

If in a suit by an agriculturist mortgagor for accounts under S. 15-D, the mortgagee challenges the transaction as being a sale, and an issue is framed to the effect whether or not the transaction was a mortgage, the suit is maintainable with all that: *A I R* 1924 *Bom* 417 and 36 *I C* 517, *Dist.* [P 307 C 1]

Nilkant Atmaram—for Appellants.

R. D. Belvi — for Respondent.

Judgment.—This is an appeal from the decision of the Assistant Judge, Belgaum. The suit is brought by the plaintiffs under S. 15-D, Dekkhan Agriculturists' Relief Act, asking for an account. For the purposes of court-fee the claim was valued at Rs. 5 which would be sufficient if the claim is merely one for an account. The learned trial Judge raised certain issues of which the first was, whether the transaction evidenced by the sale-deed dated 29th April 1915 was really a mortgage, and he answered that issue in the negative. It is apparent from that, and from the statement of the plaintiff's case in the learned Judge's judgment, that the plaintiffs were alleging that a document, in form of a sale-deed, was in fact a mortgage and that the transaction was a mortgage transaction. In the lower appellate Court a preliminary objection was taken that the plaint and memorandum of appeal were insufficiently stamped and that the suit was not properly brought under S. 15-D. The learned Judge upheld that preliminary objection and dismissed the appeal without going into the merits. In so doing the learned Judge relied on a decision of this Court in *Krishnaji* v. *Sadanand* (1).

In my opinion that case does not govern the present case. That case, and the case of *Chandabhai* v. *Ganpati* (2), on which it was founded, were both cases in which the plaintiff was suing under S. 15-D, Dekkhan Agriculturists' Relief Act, but in each case, in order to succeed, he had to set aside a certain sale, that is to say, he had to ask for substantive relief before he could get an account against the mortgagee. In the present case that is not so. The plaintiff suing under S. 15-D has to prove his mortgage. Even if he produced a plain mortgage he would have to prove it, and it might be that the mortgagee would dispute the execution of the document. As it is, he produced a document which is in form a sale-deed and therefore he has got to prove not only the execution of that document, but that it is in fact a mortgage transaction, and evidence of that he can give having regard to the provisions of S. 10-A of the Act. Mr. Belvi, on behalf of the respondent, has contended that a suit under S.15-D of the Act does not lie if

1. A I R 1924 Bom 417=80 I C 763 = 26 Bom L R 341.
2. (1916) 36 I C 517.

it involves an issue whether or not the mortgage was in existence. The passage relied on in the judgment of Sir Norman Macleod in *Krishnaji's* case (1) is this (p. 344 *of* 26 *Bom L R*) :

"It will be seen therefore that a suit of that kind (that is under S. 15-D) will only lie on the presumption that there was a mortgage in existence by an agriculturist and that an issue whether or not a mortgage was in existence could not be entertained."

I think that passage cannot be pressed to the length to which Mr. Belvi wants to press it. One must take that observation having regard to the facts of the case in which the observation was made. Mr. Belvi says that it really comes to this that unless the mortgage is admitted the case cannot fall under S. 15-D. But there is nothing in the section which provides that the mortgage must be admitted, and if that argument were to prevail, it would always be open to every mortgagee to deprive his mortgagor of the benefit of S. 15-D by simply disputing the mortgage whether on sufficient or insufficient grounds. As I have said, *Krishnaji's* case (1) is plainly distinguishable from this case because there it was necessary for the mortgagor to obtain substantive relief from the Court, that is to say, the setting aside of a deed or a declaration that such deed had become invalid before he could establish his mortgage. I think therefore that that case does not govern the present case, and that the learned Judge ought to have heard the appeal on its merits. That being so, this appeal must be allowed with costs. The case is remitted to the lower appellate Court to deal with the appeal on the merits.

V.B./R.K. *Appeal allowed.*

A. I. R. 1933 Bombay 307

MURPHY AND BROOMFIELD, JJ.

Ramchandra Babaji Gujjar, In re

Criminal Revn. Appln. No. 411 of 1932, Decided on 20th January 1933, against order of First Class Magistrate, Chikodi.

Criminal Trial—Stay of—Civil suit pending between parties—Discretion how to be exercised explained.

The discretion to be exercised by the High Court in ordering stay of criminal proceedings cannot be crystallized into a hard and fast rule, and must largely depend on the circumstances of each case. One point of importance is whether the criminal complaint has been filed before or after the civil suit. If it is filed afterwards an intention to prejudice the civil litigation which is only a matter of inference, may often be suspected, especially when there has been a long delay: *Bom Cri Rev Appl* 289 and 397 of 1932, *Rel on*; 112 *I C* 477, *Expl* and *Dist.* [P 309 C 1]

G. C. O'Gorman and *G. P. Murdeshwar*—for Petitioner.

A. G. Desai—for Opponent.

P. B. Shingne—for the Crown.

Broomfield, J.—This is an application for stay of criminal proceedings pending the decision of the civil suit in which it is contended that the same matters are in issue. Certain other prayers have been made in the application, but those have been given up. The material facts are these. The applicant has a brother named Lalchand whose house has been rented to the Nipani Municipality, or to the School Board of that Municipality, it is not quite clear which. Lalchand is, therefore, entitled to rent from the Municipality. On the other hand, he has to pay taxes to the Municipality, and there appear to have been disputes between them. On 7th March 1932, Lalchand brought a suit against the Municipality for rent and also for an injunction restraining the Municipality from recovering taxes. The opponent is the Chief Executive Officer of the Municipality. After the filing of the suit he levied a distress on a motor garage belonging to the applicant and took away certain goods to recover the amount alleged to be due from Lalchand on account of taxes. The allegation of the applicant is that the opponent was under the impression that the applicant had instigated Lalchand to bring this suit and that therefore he levied this distress mala fide. On 18th March 1932, the applicant brought a criminal complaint against the opponent and another Municipal officer charging them with the offences of house-breaking, theft and trespass. The complaint was not proceeded with, and was dismissed under S. 203, Criminal P. C., on 31st March 1932. It has been alleged by the applicant that proposals were thereafter made by the opponent for a settlement of the matter and that because of these proposals he did not apply to the District Magistrate to get his criminal complaint restored to the file. On 7th September 1932, the applicant brought a suit against the Municipality and the opponent to recover damages for wrongful distress.

We have been informed that the summons in the suit was not served upon the opponent until 12th October 1932, but as it was a suit against the Municipality previous notice of it must have been given, and we think there cannot be any doubt that the opponent must have come to know about it when, or shortly after, the plaint was presented. Then, on 20th September 1932, 13 days after the filing of the plaint in the civil suit, the opponent filed a criminal complaint of defamation against the applicant, and the defamation is alleged to consist of the charges which the applicant had made against the opponent in his complaint on 18th March 1932.

The applicant asks that the trial of this defamation case, the complaint in which was presented after the filing of the suit, should be stayed until the suit has been decided. It is contended that the material issues must be the same in the two cases, viz., whether the applicant's garage was broken open, and, if so, whether it was done bona fide, and so on. Mr. O'Gorman, who appears for the applicant, relies on *Anna Ayyar* v. *Emperor* (1), where it was held that the defendant in a civil suit ought not to be allowed to prejudice the trial of such suit by launching and proceeding with a criminal prosecution on the same facts against the plaintiff and his witnesses, and such proceedings, if launched, will be stayed by the High Court in the exercise of its powers of superintendence. There are certain passages in the judgment in that case which perhaps indicate that the Madras High Court took the view that a criminal prosecution on the same facts must necessarily prejudice the trial of a civil suit, so that the mere pendency of a civil suit instituted before the criminal complaint would be a ground for staying the criminal proceedings. If it was intended to lay down that proposition, then it appears to be contrary to the view which was taken by this High Court in *Jehangir* v. *Framji* (2). But I doubt very much whether there is anything in the judgment in the latter case which can fairly be relied upon as an argument against staying the criminal proceedings in this present case. Mirza, J., in the course of his judgment, cited, apparently with approval, a passage from the judgment in *Raj Kumari Debi* v. *Bama Sundari Debi* (3), (p. 619):

> "In the present case, the prosecution in the criminal Court is for defamation which is altogether a private prosecution . . . No Court can take cognizance of an offence like this, except upon a complaint made by the person aggrieved thereby . . . In such a case, it seems to me rather undesirable that both the civil and criminal cases should go on simultaneously at one and the same time."

Later on the learned Judge points out the distinction between public and private prosecutions. He says (p. 965 of 30 *Bom. L. R.*):

> "Where it is public, the Court, as a rule, in the exercise of its inherent jurisdiction, would not stay criminal proceedings. Where it is private, as in the present case, there would not be the same reluctance on the part of the Court to interfere with criminal proceedings."

From a further passage in Mirza, J's., judgment it appears that the Court in that particular case would actually have made the order for stay, which was in fact refused, had there not been an undertaking that the plaintiff in the civil suit, who was there the complainant in the criminal proceedings, would not make money out of the double litigation. The case of *In re Deoji* (4), relied upon by Patkar, J., in support of the proposition that the mere pendency of a civil suit or appeal is not in itself a sufficient ground for staying criminal proceedings, is quite clearly distinguishable from the present case as there was a public prosecution which had been instituted before the suit was filed. It may be noted also that Candy, J., who decided that case began his judgment with these words (p. 584):

> "No doubt this Court has often acted on the principle that criminal proceedings should not go on during the pendency of civil litigation regarding the same subject-matter. But we do not think that this is an invariable rule."

Patkar, J., also cited *Anna Ayyar* v. *Emperor* (1), to which I have already referred, and expressed no disapproval of it. I do not think it can be said, therefore, that there is anything in *Jehangir* v. *Framji* (2) which can be said to be really inconsistent with the Madras case if the proposition laid down in the latter be taken as a general and not as an invariable rule. Pat-

1. (1907) 30 Mad 226=6 Cr. L J 131.
2. (1928) 30 Bom L R 962=112 I C 477.
3. (1896) 23 Cal 610.
4. (1893) 18 Bom 581.

kar, J., in his judgment has mentioned certain tests, but it need not be supposed that they were intended to be exhaustive. In fact, they have not been treated as exhaustive, as I pointed out recently in *In re Nomanbhai Ahmedalli Tapia* (5). As the learned Judge himself said, the discretion to be exercised by the High Court in ordering stay of criminal proceedings cannot be crystallized into a hard and fast rule, and must largely depend on the circumstances of each case. One point of importance obviously is whether the criminal complaint has been filed before or after the civil suit. If it is filed afterwards an intention to prejudice the civil litigation may often be suspected especially when, as in the present case, there has been a long delay. We cannot help feeling that if the opponent here had felt a genuine grievance about the complaint which was dismissed on 31st March 1932, he would probably have made his complaint of defamation earlier. An intention to prejudice the civil litigation can hardly be anything but a matter of inference, so that even taking the criterion mentioned by Patkar, J., I am not prepared to say that it is not satisfied in the present case. The learned Magistrate, who dealt with the application made to him for stay of the proceedings, appears to have been under the impression that the civil suit and the criminal complaint of defamation were quite distinct and independent, but we do not see how that can be the case.

Mr. Desai, who appears for the opponent, has stated that he does not object to the criminal complaint being stayed until the disposal of the civil suit, although he says naturally that he makes no admissions as regards certain facts alleged in the application. Without expressing any opinion as to these allegations, we hold that this is a proper case to stay the criminal proceedings until the civil suit is disposed of. We, therefore, make the rule absolute and order accordingly.

R.K. *Rule made absolute.*

5. Bom Crim Rev Appl Nos 289 and 397 of 1932, decided on 11th January 1933 by Murphy and Broomfield, JJ.

A. I. R. 1933 Bombay 309

BEAUMONT, C. J. AND RANGNEKAR, J.

Goolbai Bomanji Petit—In re.

Bank of India, Ltd.—Appellant.

v.

Pherozshaw B. Petit and *another* — Respondents.

Original Civil Appeal No. 39 of 1932, Decided on 1st March 1933, from order of Wadia, J., in Insolvency No. 607 of 1931.

Presidency Towns Insolvency Act (1909), S. 36—Power of Court to examine witness is not limited simply because such examination may result in litigation against person examined—When examination can be ordered pointed out.

Section 36 confers upon the Court a power which is general in its character; whenever the circumstances are such as to bring the section into operation the Court can require the person concerned to be examined. And the mere fact that the information to be obtained on the examination may result in litigation against the person examined is no ground for refusing or limiting the order. But the section should not be used for the purpose of instituting a fishing cross-examination for the purpose of eliciting information to be used in a subsequent suit. The Court must see that the section is not abused, and prima facie the Court ought not to make an order under S. 36 unless there is ground for thinking that the order is likely to be of some use. The examination can be ordered when the circumstances bring the case within S. 36 (1). The examination may or may not result in some admission of liability on the part of the person examined. If there is an admission, then a summary order can be made under sub-S. (4) or sub-S. (5); if there is no admission, and the witness may refuse to make an admission however clear are the facts against him, then no summary order can be made. But the mere fact that an admission is not likely to be made is no ground whatever for refusing to direct an examination : 22 *Bom* 147 and 44 *Cal* 874, *Rel on*; *AIR* 1925 *Bom* 329 and *AIR* 1929 *Bom* 230, *Dist.*

[P 311 C 1]

Chimanlal Setalvad—for Appellant.

Jamshed Kanga—for Respondents.

Beaumont, *C. J.*—These are two appeals from orders made by Wadia, J., sitting in insolvency. The orders were made in the insolvency of one Goolbai for the examination of the respondents on the two appeals, who are respectively the son and daughter of Goolbai. The appellants, the Bank of India, Ltd., obtained a decree for Rs. 1,50,000 on 31st January 1931, against Goolbai. They presented a petition on 31st August 1931, for getting her adjudicated insolvent, and on 16th February 1932, Goolbai was adjudicated insolvent. The evidence filed on behalf of the Bank discloses various dealings between the in-

solvent and her son and daughter into which it is not necessary that I should go in detail. It is sufficient to say that the transactions are of such a nature that on the face of them they may be open to attack in the insolvency of Goolbai. That being so, the bank made an application for the examination of the son and daughter, that is to say, the two respondents, under S. 36, Presidency Towns Insolvency Act, and on 14th June 1932, Barlee, J., made an order for their examination. On 14th July, Wadia, J., varied that order by excluding from the proposed examinations various specified matters, which in substance included all the particular matters referred to in the bank's evidence. The ground upon which the learned Judge imposed that restriction was, as I understand his judgment, that he thought that an order for examination under S. 36 ought not to be made if as a result of the examination litigation between the Official Assignee and the party examined might ensue.

Now, S. 36, sub-S. (1), provides that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property. That section confers upon the Court a power which is general in its character, whenever the circumstances are such as to bring the section into operation the Court can require the person concerned to be examined, and I entirely dissent from the view that it is any ground for refusing or limiting the order that information to be obtained on the examination may result in litigation against the person examined. Indeed I think one of the objects of the section is to enable the Official Assignee to discover whether he ought to engage in litigation on behalf of the estate or not. I agree in that matter with the judgment of Greaves, J., in *In re, Haripada Rakshit* (1). Wadia, J., in his judgment has relied on the case of *In the matter of G. H. Ghanchee & Sons* (2), and on two decisions of this Court, one, *In re, Mahomed Esmail Fazla* (3), a decision of Crump, J., and the other a decision of Davar, J., *Nurmahomed v. Ismail Karim* (4).

The view which commended itself to the Courts in those cases appears to have been that the provisions of sub-S. (1), S. 36, are controlled by sub-Ss. (4) and (5) which provide a summary procedure for recovering money or property where there is no dispute. Sub-S. (4), S. 36, provides that if on his examination the person examined admits that he is indebted to the insolvent, then the Court may make a summary order for payment against him; and sub-S. (5) provides that if on his examination such person admits that he has in his possession any property belonging to the insolvent, the Court may make upon him a summary order to deliver that property to the Official Assignee. It appears that those two sub-sections were originally not limited to the case of the person under examination making an admission, and in the cases to which I have referred the learned Judges seem to take the view that, because the Act has been amended by providing that summary orders under those two sub-sections can only be made on an admission, that shows that it was intended to limit the operation of the whole section to cases in which an admission was likely to be extracted, that is to say, cases in which there was no serious dispute. I do not see the smallest justification for that construction of the section. The examination can be ordered when the circumstances bring the case within S. 36, sub-S. (1). The examination may or may not result in some admission of liability on the part of the person examined. If there is an admission, then a summary order can be made under sub-S. (4) or sub-S. (5); if there is no admission, and the witness may refuse to make an admission however clear are the facts against him, then no

1. (1917) 44 Cal 374=40 I C 94.
2. A I R 1930 Rang 32=121 I C 772=7 Rang 675.
3. A I R 1925 Bom 329=88 I C 77=27 Bom L R 551.
4. A I R 1929 Bom 230=118 I C 794.

summary order can be made. But the mere fact that an admission is not likely to be made is no ground whatever for refusing to direct an examination. Davar, J., in the case in *Nurmahomed* v. *Ismail Karim* (4) said that the section should not be used for the purpose of instituting a fishing cross-examination for the purpose of eliciting information to be used in a subsequent suit. That no doubt is so; the Court must see that the section is not abused, and prima fecie the Court ought not to make an order under S. 36 unless there is ground for thinking that the order is likely to be of some use. But, as I have said, the mere fact that the result of the examination may be of use to the Official Assignee and may be a subject of inconvenience to the person examined in future litigation is no reason for not making the order.

The learned Advocate-General on behalf of the two respondents has also contended that we ought in our discretion to refuse to make an unrestricted order under S. 36 because he says that the two respondents have made a full disclosure to the bank of all material matters. Well, if that is so, the order cannot possibly do them any harm. If the bank has already in its possession full information, then it is no doubt wasting its money in proceeding with this order. But the bank are entitled to say that they are not satisfied that full information has been given, and that they think they may acquire further useful information. On the materials which they disclose in their affidavit I am certainly not prepared to say that their view is necessarily wrong. In my opinion therefore the restrictions which the learned Judge incorporated into the two orders for the examination of these two respondents were not justified, and the two orders should be converted into the form they originally took when they were made by Barlee, J. The respondents desiring that the examination should take place before the Judge and the appellants not raising any objection, we direct that the Judge take the examination himself rather than the Registrar. Appeals allowed. Respondents must pay the costs here and in the Court below.

Rangnekar, J. — On the question of fact I desire to say very little and agree with the view taken by the learned Chief Justice that on the facts and circumstances disclosed in the affidavits in this case the learned Judge was not justified in varying the order made by Barlee, J., under S. 36, Presidency Towns Insolvency Act, for the examination of the two respondents in these two appeals.

On the question as to the true construction of S. 36, Presidency Towns Insolvency Act, with the utmost respect to the learned Judge, I am unable to agree with the view which has found favour with him as regards the object and the scope of the section. As I understand the judgment of the learned Judge, he seems to think that S. 36 provides a summary mode of discovery of the insolvent's property, for the purpose of delivering the same to the Official Assignee without recourse to any litigation, if the person examined admits it, as being in his possession and belonging to the insolvent. The learned Judge came to this conclusion on the ground that the section was amended in 1927. Before 1927 the words in sub-Ss. (4) and (5) were "If on the examination of any such person the Court is satisfied &c." By the amendment these words were deleted and in their place the following words appear "If on his examination any such person admits &c." In support of his opinion the learned Judge relies on *In re Mahomed Esmail Fazla* (3), *Lucas, In re* (5), *Nurmahomed* v. *Ismail Karim* (4) and *In the matter of G. H. Ghanchee & Sons* (2). The other ground on which the learned Judge thought that this case did not fall within the purview of S. 36 was, that, as a result of holding the examination, litigation might ensue between the Official Assignee and the respondents.

The first two cases can be distinguished, and, in my opinion, do not support the view which the learned Judge has taken. In *In re Mahomed Esmail Fazla* (3), the real point was whether an order for delivery of property should be made summarily under the provisions of sub-S. (4) or sub-S. (5), and it was with reference to that point that Crump, J., made the observations on which Wadia, J., has apparently relied. The observations are as follows (p. 553 of 27 *B. L. R.*):

5. (1915) 42 Cal 109=28 I C 469.

"If it is correct to say, as I think it as that S. 36 (4) and (5) was intended to provide summary procedure for ordering payments of debt, due and delivery of property where there was no dispute . . ., it is obvious that the procedure under that section is inappropriate in the case of such disputes as we have here" : *Lucas In re* (5).

The head-note in that case seems to me to be worded broadly and without reference to the actual point which arose for decision in the case. In that case an order was already made for examination of a lady under S. 36 and as a result of such examination an application was made that she should be ordered to deliver over to the Official Assignee certain immovable property as being the property of the insolvent. Dealing with that point the learned Judge at p. 112 observed :

"An order under S. 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent,"

and on the facts came to the conclusion that no such order could be made. In the last two cases referred to by Wadia, J., it was undoubtedly held that the amendment introduced in 1927 in sub-Ss. (4) and (5) of S. 36 restricted the scope of the inquiry under the section. With all respect, I am unable to agree with this view.

Under sub-S. (1) of the section the Court has the power to summon any person known or suspected to have in his possession any property belonging to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property. Then, before the amendment of 1927, sub-Ss. (4) and (5) provided that if on examination the Court was satisfied that the witness was indebted to the insolvent or possessed property belonging to the insolvent, the Court had the power to order him to pay the debt or deliver the property to the Official Assignee, and it is only this latter power that the amendment of 1927 has curtailed. The wording of the amendment itself, in my opinion, shows that the legislature never intended to curtail in any manner the very wide power which it had conferred on the Court under S. 36 (1) for the purpose of inquiring into the dealings and affairs of the insolvent.

With regard to the second ground, I think the very object of such an examination is to obtain information as regards the affairs and the dealings of the insolvent and to see if proceedings should not be taken in the interests of the creditors as a whole for the purpose of challenging the transactions entered into by the insolvent, and to say that litigation might ensue as the result of such an examination would, in my opinion, defeat the very object with which this section has been enacted. In this respect I agree with the view which Greaves, J., has taken in *In re Haripada Rakshit* (1). The same view has been taken by this Court in *In re Bhagwandas Narotamdas* (6), where though an order for examination of the two defendants who had filed their written statements was not made, defendant 3 who had not filed his written statement was ordered to be examined under S. 36. The only case in which, as far as I can see, any such order should not be made is where litigation has actually commenced and is pending between the parties with reference to the very question, information about which is sought to be elicited by means of such an examination. The Courts in England have taken the same view. It is unnecessary to refer to the cases cited by Sir Chimanlal Setalvad, but I think I may refer to *Learoyd* v. *Halifax Joint Stock Banking Co.* (7), and at pp. 692 and 693 the Court observed that the whole object was to get information in order to see what course ought to be followed by the Official Assignee with reference to some matter or claim in the insolvency. I think the true principle on which S. 36 (1) is based is as stated by Wace on Bankruptcy at p. 84 :

"It is of the utmost importance that a trustee (in bankruptcy) should have this power of investigating all matters relating to the estate which he is called upon to administer, much of which might often be lost to the creditors, if he were compelled to rely only upon such information as the bankrupt may be able or willing to give, or as he can ascertain from persons ready to assist him voluntarily. Without it, he would frequently be compelled to choose between abstaining from insisting upon a claim to property which he is probably entitled and commencing proceedings without knowing whether they are justified by the facts."

6. (1897) 22 Bom 447.
7. (1893) 1 Ch 686=62 L J Ch 509=41 W R 344 =68 L T 158.

I agree that the order made by the learned Judge should be set aside and that made by Barlee, J., restored.

K.S. *Appeal allowed.*

A. I. R. 1933 Bombay 313

BEAUMONT, C. J.

Maruti Gangaram Satpute—Applicant.

v.

Bankatlal Shivabakas Marwadi—Opponent.

Civil Revn. Appln. No. 60 of 1932, Decided on 17th January 1933, against order of Collector, Ahmednagar, in Revn. Appln. No. 11 of 1931.

(a) Mamlatdar's Courts Act (2 of 1906), S. 5, sub-S. 2—"Subject to same provisions"—Meaning—Person against whom injunction can be granted under S. 5 (2) need not be any person other than former owner.

The words "subject to same provisions" mean subject to the provisions of Ss. 6 and 26, those being the provisions previously referred to. Subject to those provisions the Court is to have power, when any person is otherwise than by due course of law disturbed or obstructed in the possession of any lands or premises used for agriculture and so forth to issue an injunction to the person causing or who has attempted to cause any disturbance or obstruction. In respect of the person against whom an injunction can be granted, there are no qualifying words such as are contained in sub-S. (1) relating to a person having some other right requiring such person not to have been a former owner. Hence the person against whom an injunction can be granted under sub-S. (2) may be any person including the former owner: *A I R* 1929 *Bom* 114, *Ref.* [P 314 C 1]

(b) Interpretation of Statutes — Illustrations cannot defeat plain words of Section.

Illustration cannot be used to defeat the perfectly plain words of the section. [P 314 C 1]

(c) Civil P. C. (1908), S. 115—Party having right of suit or to apply under Mamlatdar's Courts Act—Petitioner refused latter right by Collector's order—Revision lies from such order.

The applicant had two rights either to start a suit or to apply under the Mamlatdars' Courts Act, and the effect of the Collector's order was to deprive him of that second right:

Held; that revision lay from the Collector's order even though the applicant had the right of suit: *A I R* 1920 *Bom* 67, *Dist.* [P 314 C 2]

M. B. Dave and *Thakordas & Co*—for Applicant.

I. K. Vakil—for Opponent.

Judgment.—This is an application in revision in which I am asked to set aside an order of the Collector of Ahmednagar made under S. 23, Mamlatdars' Courts Act (Bombay Act 2 of 1906). The petitioner filed a suit No. 10 of 1931 against the respondent in the Mamlatdar's Court claiming an injunction to restrain the respondent from disturbing the petitioner in possession of the lands in dispute. The Mamlatdar after hearing the evidence gave the injunction asked for. The respondent then applied to the Collector under S. 23 of the Act, and the Collector set aside the Mamlatdar's order on the ground that the Mamlatdar had no jurisdiction in the matter. The learned Collector took a view of the Mamlatdars' Courts Act with which I find myself wholly unable to agree. He held that sub-S. (2) of S. 5 did not justify the issuing of an injunction against a person who had been a former owner of the petitioner's land.

Now S.5, sub-S.(1)of the Act provides that every Mamlatdar shall preside over a Court which shall be called a Mamlatdar's Court and which shall, "subject to the provisions of Ss. 6 and 26" have certain powers. S. 6 gives to the Collector power to transfer suits from a Mamlatdar's Court, and S. 26 limits the jurisdiction of the Mamlatdar by providing that no suit shall lie against Government or in certain specified matters. The powers conferred by sub-S. (1) of S. 5 upon the Mamlatdar are to give immediate possession of any lands and so forth used for agricultural púposes to any person who has been dispossessed or deprived thereof otherwise than by due course of law, or who has become entitled to the possession or restoration thereof by reason of the determination of any tenancy or other right of any other person, not being a person who has been a former owner or part-owner within a period of twelve years before the institution of the suit. It seems to me clear, as matter of construction of that sub-section, that the words "not being a person who has been a former owner" and so forth qualify only the words "or other right of any other person," that is to say, the person referred to in that sentence who has the other right must not be a previous owner. That was the view of the words taken by Madgavkar, J., in the case of *Kisan* v. *Shripat* (1). Then sub-S. (2) of S. 5 provides that the said Court shall also "subject to the same provisions" have certain powers as to injunction. I read those words as meaning

1. A I R 1929 Bom 114=112 I C 462.

simply subject to the provisions of Ss. 6 and 26, those being the provisions referred in the previous sub-section. Subject to those provisions the Court is to have power, when any person is otherwise than by due course of law disturbed or obstructed in the possession of any lands or premises used for agriculture and so forth to issue an injunction to the person causing or who has attempted to cause any disturbance or obstruction. In respect of the person against whom an injunction can be granted, there are no qualifying words such as are contained in sub-S. (1) relating to a person having some other right requiring such person not to have been a former owner. But the learned Collector thinks that such a qualification can be incorporated by reason of the words to which I have referred, "subject to the same provisions." As I have said, in my opinion, those words merely refer to the provisions of Ss. 6 and 26, and it seems to me quite impossible as matter of construction of those two sub-sections of S. 5, to say that the person against whom an injunction can be granted under sub-S. (2) must be a person other than a former owner. If that had been the intention of the legislature it would have been easy to say that an injunction was only to be granted against a person not being such former owner or part-owner as aforesaid. But those words are not there. The learned Collector referred to Illus. 3 as supporting his view. That illustration is not, I think, a very happy one because it does not make it plain whether it is intended to be an illustration under sub-S. (1) or sub-S. (2). It seems to refer partly to both sub-sections. But in any case the illustration cannot, in my opinion, be used to defeat the perfectly plain words of the section. That being so, I think the Collector was wrong in holding that the Mamlatdar had no jurisdiction.

I was referred by Mr. Vakil for the respondent to the case of *Irbasappa* v. *Basangowda* (2), in which this Court held that an application in revision would not generally be entertained where the parties had another remedy, and since under the Mamlatdars' Courts Act, the proceedings are purely summary and the parties can get their ultimate rights determined in a suit, the Court in that case refused to interfere. I do not desire to throw the slightest doubt on the correctness of that decision, or the principle on which it is based. But here the applicant had two rights—either to start a suit or to apply under the Mamlatdars' Courts Act, and the effect of the Collector's order is to deprive him of that second right. In the case of *Irbasappa* v. *Basangowda* (2) the Collector had not held that the Mamlatdar had no jurisdiction; he merely disagreed with the Mamlatdar's appreciation of the evidence, and that being so I entirely agree, if I may respectfully say so, with the view which the Court took that the proper course for the appellant was to start a suit and get his rights determined therein. But here the order of the Collector denied the right of the applicant to go at all to the Mamlatdar's Court, and as I feel confident that the applicant had that right, I think I am bound to interfere. I therefore allow the application and direct that the Collector's order be set aside and the Mamlatdar's order restored. The respondent must pay the costs of this application.

K.S. *Order set aside.*

2. A I R 2920 Bom 67=57 I C 432=44 Bom 595.

A. I. R. 1933 Bombay 314

PATKAR AND BARLEE, JJ.

Secy. of State—Appellant.

v.

Javerchand Panaji—Respondent.

First Appeal No. 571 of 1927, Decided on 17th January 1933, from decision of Dist. Judge, Surat, in Civil Suit No. 12 of 1925.

(a) Bombay Land Revenue Code (5 of 1879), Ss. 119 and 121 — Collector has no jurisdiction to determine acquisition of right by adverse possession — He can only decide boundary dispute — Extent of civil Court jurisdiction stated.

Under Ss. 119 and 121, Land Revenue Code, the Revenue or Survey Officer has the right to settle conclusively the boundary dispute between the parties and determine the title of parties flowing from the position of the boundary line but has no jurisdiction to decide whether or not a holder of one survey number has acquired by prescription title over the land of adjoining survey number by adverse possession. And the Collector's decision does not preclude any one of the disputing parties from invoking the aid of the civil Court on the ground that he had acquired a portion of his neighbour's survey number by adverse possession : *AIR* 1921 *Bom* 63 ; *AIR* 1922 *Bom* 293 and 10 *Bom* 456, *Ref.* [P 316 C 1,2]

The civil Court's jurisdiction is barred so far as determination of boundary line is concerned. The question of adverse possession arises only when a person who has no title encroaches on the land of another and the true owner does not bring a suit for possession in a civil Court for more than 12 years. That question must be decided by the civil Court, and outside the jurisdiction of the Collector : 25 *Bom* 312, *Ref.* [P 316 C 1, 2 ; P 317 C 1]

(b) Bombay Revenue Jurisdiction Act (10 of 1876), S. 4 (a) — Decision by Collector on question of title based on adverse possession is ultra vires and S. 4 (a) is no bar to civil suit.

A decision by the Collector on the rights of the parties based on adverse possession is ultra vires and hence the bar under S. 4 (a), Revenue Jurisdiction Act, does not arise : *AIR* 1921 *Bom* 273, *Rel on.* [P 317 C 1]

B. G. Rao—for Appellant.

G. S. Rao and *H. V. Divatia*—for Respondent.

Patkar, J.— In this case the plaintiff sued the Secretary of State for a declaration of his title to a portion of the land situate to the east of Survey No. 452 on the allegation that he purchased the land Survey No. 451, and that he had acquired title to the land in dispute by adverse possession. It appears that one Ranchhod Rama, the holder of Survey No. 452, made an application to the revenue authorities for determination of the boundary between Survey No. 451 and Survey No. 452 on 12th February 1918. The matter was referred to the Mahalkari and the Circle Inspector. On 29th October 1918, it was found that Survey No. 452 was encroached upon and on 4th January 1922, the District Deputy Collector referred the applicant to a civil Court. It appears however that this order was set aside on appeal, and on 22nd March 1923, the District Deputy Collector passed an order, Exhibit 38, holding that the property in dispute formed part of Survey No. 452 and ordered the eviction of the plaintiff. The order of the District Deputy Collector was confirmed in appeal by the Collector, by the Commissioner and by Government, and on 14th August 1925, notice was given under S. 202 to the plaintiff to vacate the land, whereupon the plaintiff brought the present suit on 2nd September 1925. The defendant raised several objections, that the notice was bad under S. 80, Civil P. C., that the suit was barred under Ss. 119 and 121, Bombay Land Revenue Code, and S. 4 (g) and S. 4 (a), Bombay Revenue Jurisdiction Act, that the suit was barred by limitation, and on the merits it was contended that the plaintiff did not acquire title by adverse possession. The learned District Judge disallowed all the objections of the defendant and passed a decree in favour of the plaintiff.

The first question arising in the appeal is whether the notice is bad under S. 80, Civil P. C. The ground of objection is that the cause of action was initially stated to arise on 22nd March 1924, when the District Deputy Collector passed the order, Exhibit 38, ordering eviction of the plaintiff, and subsequently the plaintiff applied for amendment of the plaint and introduced another date, namely, 29th August 1925, as the date on which the cause of action arose in paras. 10 and 11 of the plaint, and it is therefore contended that the notice given before the accrual of the cause of action subsequently mentioned was invalid, and the remedy of the plaintiff was to withdraw the suit, give a fresh notice, and bring another suit. It appears however that in the written statement of the defendant the real cause of action was stated to arise on 22nd March 1923, the very date which was mentioned by the plaintiff in the unamended plaint as being the date on which the cause of action arose. That being so, it appears that both the parties were at one with regard to the date of the cause of action, namely, that it arose on 22nd March 1923, and if that is so, notice which was given under S. 80 stating the cause of action to have arisen on 22nd March 1923, cannot be said to be in any way irregular or defective. It appears that the plaintiff by way of caution got an amendment made in the plaint and alleged that the cause of action arose either on 20th August 1925, when the notice of eviction was affixed to the outer door of the plaintiff's house or earlier on 9th December 1924, when the plaintiff was informed that the Government declined to interfere with the orders already passed. The order of eviction followed, as a matter of course, the order passed by the District Deputy Collector on 22nd March 1923, and we think that the real cause of action arose on 22nd March 1923, and in that view the notice given by the plaintiff was valid. We therefore agree with the view of the lower Court that the notice given under S. 80 was proper.

The second point urged before us is that the suit was barred under Ss. 119 and 121, Bombay Land Revenue Code, and S. 4 (g), Bombay Revenue Jurisdiction Act. It appears from the evidence of the Circle Inspector that there were already boundary marks in Survey No. 452. There does not appear therefore to be a real boundary dispute between the adjoining owners of Survey Nos. 451 and 452. The real question between the parties was whether the land in dispute was in possession of the plaintiff for more than 12 years. The Mahalkari in his order disregarded the question of adverse possession on the ground that the plaintiff had not proved that his possession of the encroached land was anterior to the British Rule. The District Deputy Collector held that the land was encroached upon by the neighbour and therefore he was liable to be evicted.

According to the decision in *Bhaga* v. *Dorabji* (1) the decision of the Collector under S. 121 amounts to nothing more than the determination of the position where the boundary line lies, and the title of the parties is determined according to the position of the boundary line. The Collector's decision however does not preclude any one of the disputing parties from invoking the aid of a civil Court on the ground that he had acquired a portion of his neighbour's survey number by adverse possession. Some doubt seems to have been thrown on this decision by Marten, C. J., in the case of *Kanhailal* v. *Ismailbhai* (2). It appears, however that in *Bai Ujam* v. *Valiji Rasulbhai* (3), Sir Charles Sargent observed as follows (p. 460):

> "We agree therefore with the Subordinate Judge that, as the piece of land in question is admittedly within the boundary as fixed by (the) Collector, and as the defendant does not claim to have acquired, since the Collector's decision, the right to hold the plaintiffs' land except by adverse possession, which the Subordinate Judge finds not proved, the plaintiffs are entitled to have the possession of it restored to them."

According to the decision in *Ganesh* v. *Ramchandra* (4) the inquiry officer has jurisdiction under S. 121, Bombay Land Revenue Code, to settle the boundary between the lands of adjoining owners, and the line drawn by him to indicate the boundary is determinative of the rights of land-holders on either side but he has no jurisdiction to decide the right which the owner of one number claims to exercise over the land belonging to holder of adjoining number. In *Malkarjunappa* v. *Anandrao* (5) it was held that it was doubtful if the Provincial Legislature could have excluded the jurisdiction of a civil Court to decide the rights of parties. The revenue or survey officer has the right to settle conclusively the boundary dispute between the parties and determine the title of parties flowing from the position of the boundary line but has no jurisdiction to decide whether or not a holder of one survey number has acquired by prescription title over the land of adjoining survey number by adverse possession.

Section 119, Cl. (1), refers to the determination of field boundaries at the time of survey, and Cl. (2) refers to the determination of the boundary after the survey or in respect of a field or holding that has not been surveyed. The dispute in respect of a field already surveyed would arise either on account of accidental or intentional obliteration of boundary marks. The legislature has confided the power of determining the boundary line to the revenue authorities. After the boundary line has been determined by the Collector the decision of the Collector is conclusive as to the proper position of the boundary line or boundary marks and of the rights of land-holders on either side of the boundary. If the disputed strip of land forms part of the plaintiff's survey number demarcated by the boundary fixed by the Collector, the title of the plaintiff is conclusive and he can bring a suit in the civil Court on the strength of title and such a suit is not barred by Ss. 119 and 121, and Cl. (g) of Act 10 of 1876—see *Bala* v. *Nana* (6). If a plantiff brings a suit for possession on the strength of his title before the determination of the boundary by the Collector, and it appears that the question between the parties is a boundary dispute only, the Court may direct one of the parties to apply to the Collector and obtain a decision of that officer according to the decision

1. A I R 1921 Bom 63=59 I C 440=45 Bom 67.
2. A I R 1927 Bom 140=99 I C 823.
3. (1886) 10 Bom 456.
4. AIR 1922 Bom 293=64 I C 564=46 Bom 390.
5. AIR 1929 Bom 391=122 I C 137=53 Bom 766.
6. (1898) P J 799.

in *Lakshman* v. *Antaji* (7), and such decision of the Collector will be conclusive as to the position of the boundary line. The civil Court's jurisdiction is barred so far as determination of boundary line is concerned. The question of adverse possession arises only when a person who has no title encroaches on the land of another and the true owner does not bring a suit for possession in a civil Court for more than twelve years. That question must be decided by the civil Court, and is outside the jurisdiction of the Collector.

It appears that the dispute between the parties in the present case before the revenue authorities was not strictly a boundary dispute, for according to the evidence of the Circle Inspector the boundary marks were already in existence. The decision of the question whether the plaintiff was entitled to retain possession of the land by virtue of adverse possession was beyond the jurisdiction of the revenue authorities, and fell properly within the jurisdiction of a civil Court. We think therefore that the suit is not barred under S. 119 or under S. 121 of the Bombay Land Revenue Code or under S. 4 (g), Bombay Revenue Jurisdiction Act. The next question is whether the suit is barred under S. 4 (a), Bombay Revenue Jurisdiction Act. The learned District Judge has given three reasons for holding that the suit is not barred under S. 4 (a), Bombay Revenue Jurisdiction Act. I think however that one of the reasons is conclusive against the application of S. 4 (a), Bombay Revenue Jurisdiction Act, and therefore it is unnecessary to discuss the other grounds. As I have already stated, the revenue authorities had no jurisdiction to decide the rights of the parties based on adverse possession, which was a matter peculiarly within the jurisdiction of a civil Court. If the order of the District Deputy Collector is ultra vires, the bar under S. 4 (a), Revenue Jurisdiction Act would not arise according to the decision of this Court in *Patdaya* v. *Secretary of State* (8).

Similarly, the question of limitation also would not arise if the order of the District Deputy Collector was ultra vires. The next question is whether the plaintiff has proved that he has acquired title to the land by adverse possession. It is contended on behalf of the appellant that the possession which has been proved in this case was merely permissive or such that a true owner would not object to according to the decision in *Framji Cursetji* v. *Gokuldas Madhowji* (9), or was not such as would amount to adverse possession according to the decision in *Ganpati* v. *Raghunath* (10). It appears however from the evidence that the land was enclosed by a hedge ever since the purchase of the plaintiff in 1908. In 1913 there was an erection of a structure of corrugated iron sheets on the land in dispute and the Circle Inspector in his evidence stated that he had satisfied himself in 1918 that there was an encroachment and came to the conclusion that the encroachment must have been prior to the plane table survey, which was effected in 1911 and 1912. It would therefore follow that there were acts of ownership exercised by the plaintiff on the land in suit. The physical facts proved in the case coupled with the evidence of the defendant himself and his witnesses Hira, Ex. 66, Amarchand, Ex. 65, Mohanlal, Ex. 64, and Khimchand, Ex. 62, establish that the plaintiff has acquired title to the land by adverse possession at least from 1908, the date on which he purchased the land in suit. Mithal Daya, Ex. 89, stated that the encroachment was effected more than twelve years before suit. We think, on the whole, that the evidence on behalf of the plaintiff proves that the plaintiff has acquired title to the disputed land by adverse possession. The view therefore of the lower Court is right, and this appeal must be dismissed with costs.

Barlee, J.—I agree.

K.S. *Appeal dismissed.*

7. (1900) 25 Bom 312=2 Bom L R 1083.
8. AIR 1924 Bom 273=82 I C 577=48 Bom 61.
9. (1892) 16 Bom 338.
10. (1909) 33 Bom 712=4 I C 244.

* A. I. R. 1933 Bombay 317

BEAUMONT, C. J. AND RANGNEKAR, J.

Dhanrajgirji Narsingirji—Appellant.

v.

Payne & Co.—Respondents.

Original Civil Appeal No. 44 of 1932, Decided on 3rd March 1933, from order made by Mirza, J., in Suit No. 3200 of 1931.

*(a) **Legal Practitioner — Solicitor—Solicitor acting for non-existing person is personally liable for costs.**

A solicitor who purports to act for a non-existing person is personally liable to pay costs: *Case law referred* [P 319 C 1; P 320 C 1]

(b) **Legal Practitioner — Solicitor acting for non-existing person—Procedure for recovering costs.**

Per *Rangnekar, J.*—The proper procedure for recovery of costs from a solicitor who acts for a non-existing party is by an application in the suit itself, though a suit to recover such costs under such circumstances may be competent. [P 321 C 1]

(c) **Letters Patent (Bombay), Cl. 15—Solicitor acting for non-existing party—Order on motion in suit for recovery of such costs is appealable.**

Per *Rangnekar, J.*—An order passed on a motion in a suit for recovery of costs against a solicitor who acts for a non-existing party is an appealable order within the meaning of the Letters Patent. [P 321 C 2]

Jamshed Kanga and *M. L. Maneksha* —for Appellant.

C. K. Daphtary, M. C. Setalvad and *R. J. Kolah*—for Respondents.

Beaumont, C. J.—This is an appeal from an order made by Mirza, J., on a motion taken out by the attorneys for the defendant in a suit against Messrs. Payne & Co., who were solicitors for the alleged plaintiff in the suit, and the motion asks that Messrs. Payne & Co. be ordered to pay the defendant's costs of the suit less certain costs which the defendant had already been directed to bear. The ground on which the motion was based was that the plaintiff in the suit is a non-existent person, and the appellant contends that the English rule which in such a case imposes upon the solicitor purporting to act for a non-existent person liability to pay costs should be held to apply in India. The suit was started by the presentation of a plaint on 24th November 1931, and on the previous day there was a request by Messrs. Payne & Co. to file an appearance, that request being in Form No. 2 of the forms to the High Court Rules. In December there was a summons for directions, and on 22nd February 1932, the solicitors for the defendant, Messrs. Dastur & Co., wrote to Messrs. Payne & Co. contending that there was in fact no such company as the alleged plaintiff. Notwithstanding that letter, Messrs. Payne & Co. as late as 29th March wrote saying:

"We are advised that your contention that we are acting on behalf of a non-existent plaintiff is without substance."

The suit then proceeded, and there were various interlocutory matters, and eventually Messrs. Payne & Co. came to the conclusion that at any rate their description of the plaintiff was wrong, and they took out a summons for leave to amend by altering the plaintiff's name. The learned Judge came to the conclusion that it was not a case of misdescription of an existing plaintiff, but was a case of a suit having been started in the name of a non-existent plaintiff, and on that view he naturally refused leave to amend.

There was no appeal from that order. Subsequently a preliminary issue was raised in the suit as to whether or no the plaintiff existed, and on that issue it was decided that the plaintiff was non-existent. This motion was then launched and was argued, as I gather, at considerable length before the learned Judge who reserved judgment. In the judgment which he ultimately delivered the learned Judge appears to express the view that in India a solicitor acting for a non-existent party cannot be made liable for costs. But then it seems to have occurred to him that it was undesirable to decide the matter on a motion in the suit, and so he gave leave to the parties to file a suit. The actual form of his order was that the application for an order directing the respondents to pay the defendant the costs of the suit be and is hereby refused, and he then gave liberty to the defendant to file a suit against the respondents within a limited period and made the costs of the motion depend upon whether the suit was filed or not. No objection had been taken by the parties to the jurisdiction of the Court to decide the matter on this motion, and I am clearly of opinion that the learned Judge ought to have disposed of the matter on the motion. I may observe that we have already held on a preliminary objection that an appeal lies against the learned Judge's order. I can see no advantage to be derived from referring the parties to a suit, because I am satisfied on Mr. Payne's own affidavit that there can be no question that the plaintiff in this suit is a non-existent person. The plaintiff is described as Pietro Guerrieri & Co., Ltd., a private joint stock company incorporated in Italy and having its registered office at Florence in Italy and its branch office

at Beach House, Colaba, without the Fort of Bombay. It is not disputed that there is in fact no company of the name given; it is not incorporated in Italy or anywhere else and it has not its registered office at Florence. Mr. Payne in his affidavit sets out the facts which induced him to start the suit in the name of this plaintiff, and no doubt he was acting entirely bona fide.

The contracts in the suit show that a private individual or a firm was trading as Pietro Guerrieri & Co., Ltd. But it is quite clear that the description in this plaint is of a distinct limited joint stock company and cannot be taken to be a mere misdescription of some individual or firm. I am bound to say that I think the solicitors were guilty of a measure of negligence because they must have appreciated, if they had considered the matter for a moment, that the allegation that a company incorporated in Italy had as part of its name the English word "limited" was almost certainly wrong, and if they had inquired of the Registrar at Florence as to what the correct name of the company was they would then have ascertained that in fact there was no such company in existence. Mr. Daphtary for the respondents has admitted that he has found no case in which this point has ever been raised in England by an independent suit; it is always raised in the suit in which the solicitor has purported to act for a non-existent person.

Now dealing with the case on the merits the rule in England is clear that a solicitor purporting to act for a non-existent party is personally liable for costs: see *Hoskins* v. *Phillips* (1), *Yonge* v. *Toynlee* (2), and *Simmons* v. *Liberal Opinion Limited. Dunn, In re* (3). The rule is founded on the principle that a solicitor purporting to act as such for a party represents that he has authority to act and warrants to the other parties in the suit that he possesses that authority. The reasons which led to the adoption of the rule in England are very clearly expressed in *Yonge* v. *Toynbee* (2) by Swinfen Eady, J., as he then was, who was sitting temporarily in the Court of appeal. The views of that learned Judge on such a question are, I think, entitled to peculiar weight because not only had he been a solicitor himself, but his knowledge of all matters of practice and procedure was profound. What he says at p. 233 is this:

"I wish to add that in the conduct of litigation the Court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one."

The particular case with which the Court was there dealing was of that nature. Later on the learned Judge says (p. 234):

"The manner in which business is ordinarily conducted requires that each party should be able to rely upon the solicitor of the other party having obtained a proper authority before assuming to act. It is always open to a solicitor to communicate as best he can with his own client, and obtain from time to time such authority and instructions as may be necessary. But the solicitor on the other side does not communicate with his opponent's client, and, speaking generally, it is not proper for him to do so, as was pointed out by Kekewich, J., in *Margetson and Jones, In re* (4). It is, in my opinion, essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client; if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorized in what he said or did, and it would be impossible to conduct legal business upon the footing now existing; and, whatever the legal liability may be, the Court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority."

In my opinion every word of that passage is as applicable to solicitors in Bombay as to solicitors in England. As was pointed out by Sir Amberson Marten in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.* (5) (p. 1205):

". . . the rights and duties of attorneys are in no way part of the indigenous law or practice in India. Their profession originates from England; it grew up under the English common law; and it is clear that it was the common law which governed their rights and duties in the King's Courts established by the Supreme Court Charter of 1823, to which Courts our present High Court is the successor."

1. (1847) 16 L J Q B 339.
2. (1910) 1 K B 215=79 L J K B 208=102 L T 57=26 T L R 211.
3. (1911) 1 K B 966=80 L J K B 617=27 T L R 278=55 S J 315=104 L T 264.
4. (1897) 2 Ch 314=66 L J Ch 619=76 L T 805=45 W R 645.
5. A I R 1927 Bom 542=51 Bom 855.

Solicitors in India have many important privileges which they have inherited from their brothers in England and I think they must also assume similar liabilities. It is contended by Mr. Daphtary on behalf of the respondents that having regard to the different practice which prevails in India in the institution of suits to that which prevails in England the English rule imposing this liability upon solicitors ought not to apply in India. The only substantial difference between the practice in this country and the practice in England in relation to the commencing of the suit is that in England the suit is commenced by the issue of the writ of summons on which the solicitor has to endorse his name and address, whereas in this country the suit is instituted by the presentation of a plaint which has to be signed by the party and the pleader, if any, or if the party is not available then by his duly constituted agent under O. 6, R. 14. But, in my opinion, that variation in the practice does not affect the question under consideration. Even where an agent signs the plaint I can see no reason for suggesting that he represents the party except for the purpose of such signature. The next step in the suit in India is for the appearance of the plaintiff to be entered, and that is done under R. 93, High Court Rules in Form No. 2 by a letter addressed by the solicitors to the Prothonotary requesting him to file an appearance on behalf of the plaintiff. That form was duly followed in this case, and the solicitors signed that request, and, in my opinion, the moment they did that, they warranted that they had authority to act on behalf of their client. For these reasons I think that the appellants were entitled to the order for which they asked on the motion, and the appeal must therefore be allowed with costs.

Rangnekar, J.—This appeal raises an important question as to the personal liability of a solicitor for costs of a suit started in the name of a non-existing plaintiff. The suit which gives rise to this appeal was brought in the name, as the title shows, of Pietro Guerrieri & Co., *Ltd.*, a private joint stock company incorporated in Italy and having its registered office at Florence in Italy. The plaint was declared on 24th November 1931 signed by Pietro Guerrieri as director and also by Messrs. Payne & Co., who filed their appearance and took out a summons for directions on 12th December 1931. On 28th January 1932 the defendant filed his written statement and in para. 3 thereof he denied that the plaintiffs were a private joint stock company incorporated in Italy or in any other place or that they had their registered office at Florence in Italy. He further stated that at all times material to the suit there was no joint stock company bearing the name of Pietro Guerrieri & Co. Ltd., incorporated or registered either in Italy or in any other place.

Thereafter the defendant's solicitors took search of the papers in the office of the Registrar of Companies and found no document of the incorporation of the alleged plaintiff company. They also discovered that it was a private partnership firm. Correspondence ensued between the respective solicitors and it was contended by the defendant's solicitors that there was no such company in the name of Pietro Guerrieri & Co. incorporated anywhere. In March 1932 they addressed a notice to Messrs. Payne & Co. personally, stating that they had purported to act and were persisting in acting on behalf of a non-existing plaintiff. They further stated that their client would ask for an order against Messrs. Payne & Co. personally for costs of the suit. Messrs. Payne & Co. sent a reply in which they stated inter alia that they were advised that Messrs. Dastur & Co.'s contention that they were acting on behalf of a non-existing plaintiff was without foundation. On 22nd March 1932, Messrs. Dastur & Co. applied for the trial of certain preliminary issues which raised this question as to the existence or non-existence of this alleged plaintiff company. It is unnecessary to refer to the further correspondence which took place between the parties. It appears that the attitude taken up by Messrs. Payne & Co. was that the contention raised by Messrs. Dastur & Co. was unfounded and was wrong. On 15th July 1932 Messrs. Payne & Co. applied for amendment of the plaint on the footing that the description of the plaintiff as a registered joint stock company and having an office was a misdescription. That amendment was disallowed and the summons dismissed

with costs. The matter came on for trial of the preliminary issues and they were found in favour of the defendant. The result was that the suit became a suit instituted by a non-existent person from the commencement. On the same day Messrs. Dastur & Co. served a notice on the respondents that they would ask for an order for costs personally against them, and it is that notice which has given rise to the present appeal. The actual order made by the learned Judge on the notice is as follows:

"The notice is discharged. If the defendant files a suit against Messrs. Payne & Co. within four weeks from this day, costs of the notice of motion will be dealt with by the Judge hearing that suit. If no such suit is filed within the aforesaid time, the notice will be discharged with costs. If an appeal is preferred from this judgment the time for filing the suit will be extended to four weeks from the date of the disposal of such appeal."

In the course of his judgment, although the learned Judge in one place stated that he expressed no opinion on the claim advanced on behalf of Messrs. Dastur & Co.; in another part of his judgment he held that the application was incompetent as the law in practice in India was materially different from that in England. The observations of Sir Amberson Marten, C. J., in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.* (5), were referred to on the question of the position of solicitors in this country, but the learned Judge thought that they were obiter dicta. In that case Marten, C. J., held that the law applicable to the solicitors in Bombay on the Original Side of the High Court was the Common law prevailing in England as applicable to the solicitors there. The learned Judge further considered the question of costs or compensation to the defendant and expressed an opinion that the sum which the plaintiff had been ordered to deposit was a sufficient security to the defendant even if he succeded on his claim on the notice. Mr. Daphtary on behalf of the respondents raised a preliminary objection which we disposed of yesterday. It is not necessary to consider whether the proper procedure for recovering costs from a solicitor who purports to act on behalf of a non-existent plaintiff or who defends a suit on behalf of a non-existent defendant would be by way of a suit or by a motion. All the authorities that we have been referred to show that the proper procedure should be by an application in the suit itself, though, as at present advised, I am not prepared to say that a suit to recover such costs under such circumstances is not competent. But I have no doubt in my mind that having regard to the views expressed by the learned Judge in his judgment in this case and the form of the order which he made whereby he put the defendant on terms as to the bringing of the suit, this particular order is an appealable order within the meaning of the Letters Patent.

Till Mr. Daphtary came to the end of his argument I was under the impression that there was no dispute that in this suit Messrs. Payne & Co., did act as solicitors on behalf of the non-existing person; but at the end of the argument Mr. Daphtary put forward a contention that the plaintiff was not a non-existent person in fact; and he referred us to the affidavit of Mr. Payne, para. 6. That no doubt shows that in that particular paragraph Mr. Payne did state that his firm did not act on behalf of a non-existent person. But the paragraph in question must be construed with reference to the whole of the affidavit and with reference to what took place before the learned Judge on the notice. In my opinion the affidavit read as a whole clearly shows that it was never seriously contended that Messrs. Payne & Co. did not appear for a non-existent person, and, as far as I can see, there is no trace of any such contention having been raised at the hearing of this notice before Mirza, J. Apart from that, the finding on the issues clearly show that the so-called plaintiff never existed; there never was a private joint stock company incorporated in Italy and having its registered office at Florence in Italy, and it is difficult for me to accept Mr. Daphtary's contention.

In England there is ample authority that if an action is brought in the name of a non-existent person or a defence put in on behalf of a non-existent defendant the solicitor who is responsible for the conduct of the suit or for the defence is personally liable to pay costs to the opposite party. The question then is whether the position in Bombay is the same so far as the original side of the High Court is concerned.

The position of the solicitors, their rights and their liabilities came up for consideration as far as I know for the first time in *In re, Tyabji & Co.* (6) before Tyabji, J., and in that case the observations of the learned Judge which seem to me pertinent are as follows (p. 550):

"As there appears to be some doubt as to the exact nature of the jurisdiction exercised by this Court in matters of solicitor's lien for costs, and, as to the occasion on which such jurisdiction (if any) should be exercised, I thought it desirable to take time to consider my judgment, and I have carefully looked into the authorities, and am now prepared to give my decision. As to the general jurisdiction of the Court, it does not seem to me that there can really be any doubt that the High Court now possesses the summary jurisdiction which is sought to be invoked. The solicitors and attorneys of this Court have always been regarded by the High Court as . . . . officers of the Court, and therefore entitled to special protection for the payment of their costs. And it has been hardly disputed before me that the Courts in England, prior to the establishment of the High Courts in India, exercised such summary jurisdiction and gave to the solicitors a lien, upon the fruits of their exertions, for the due payment of their costs. The present jurisdiction of the High Court has been inherited from the Supreme Court, and the jurisdiction of the Supreme Court was admittedly of the same character and nature as the jurisdiction exercised by the Courts in England, both on the Common law side, and on the chancery side. Whatever was the summary jurisdiction of the Supreme Court on this point is now vested in the High Court, and it has not been in any way affected or interfered with by any enactments, either of the Imperial legislature of England, or of the legislature in India. The Solicitors Act, 23 & 24 Vic. c. 127, passed in England, has not in any way been extended here, and therefore the jurisdiction which I can exercise here is the jurisdiction which was vested in the Supreme Court; that is to say, in the Courts of England, before the Act in question was passed."

These observations show that the High Court has the same jurisdiction as the Courts in England as to the question of costs of solicitors. This case was followed in *A. Haji Ismail & Co.* v. *Rabiabai* (7), where Macleod, J., held that the rule of common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertions has always been followed by this Court. Both these cases in turn were approved and followed in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.* (5) to which I have referred. Marten, C. J., in that case observed as follows (p. 1205):

"In the first place it must be clearly understood that the rights and duties of attorneys are in no way part of the indigenous law or practice in India. Their profession originates from England; it grew up under the English common law; and it is clear that it was the common law which governed their rights and duties in the King's Court's established by the Supreme Court Charter of 1823, to which Courts our present High Court is the successor. We have recently in two important cases had to consider in this Court the jurisdiction which we inherit from the Supreme Court. It is clear, as has already been pointed out in *Hirabai* v. *Dinshaw* (8) and in the recent Special Bench case of *Hatimbhai* v. *Framroz Dinshaw* (9) that the jurisdiction of the Court of King's Bench in England and that of the Courts of equity in England were conferred upon the Supreme Court by, inter alia, Cls. 5 and 36 of the Supreme Court Charter of 1823, counting those clauses from the operative part and neglecting the recitals."

Then later on the learned Chief Justice referred to the two cases which I have mentioned, with approval, and he next turned to the Calcutta authorities which, as he points out, lay down the same principle. With great respect to Mirza, J., I am clearly of opinion that these observations are not obiter dicta. The question as to the position of solicitors practising on the original side was one of the questions which directly arose in that case.

That being so, the next question is as to what is the common law liability of solicitors in a case like this, and on that point there can be no doubt that in England the rule is well established that a solicitor is personally liable to pay the costs to the opposite party. I only propose to refer to two of the later decisions. In *Yonge* v. *Toynbee* (2) the solicitors were instructed by a client to conduct his defence to an action which was then threatened and was afterwards commenced against him. Before the commencement of the action the client became and was certified as being of unsound mind.

In ignorance of his unsoundness of mind and of his having been so certified the solicitors entered an appearance for him in the action and delivered the defence to which the plaintiff replied and other interlocutory proceedings took place in the action. Subsequently, the action not then having come to trial, the plaintiff's solicitor was informed that the defendant had been certified as being

6. (1905) 7 Bom L R 547.
7. (1909) 34 Bom 484=4 I C 135.
8. AIR 1927 Bom 22=51 Bom 167=98 I C 949.
9. AIR 1927 Bom 278=51 Bom 516=104 I C 8 (F B).

of unsound mind and an application was made on behalf of the plaintiff at chambers for an order that the appearance and all subsequent proceedings in the action should be struck out and that the solicitors who had assumed to act for the defendant should be ordered personally to pay the plaintiff's costs of the action up to date on the ground that they had so acted without authority, and it was held that the solicitors who had taken on themselves to act for the defendant in the action had thereby impliedly warranted that they had authority to do so, and therefore were liable personally to pay the plaintiff's costs of the action. Buckley, L. J., puts the principle in this way. He says (p. 226):

"His liability arises from an implied undertaking or promise made by him that the authority which he professes to have does in point of fact exist."

Then Swinfen Eady, J., as he then was, made certain observations which seem to me very important. He says (p. 233):

"I wish to add that in the conduct of litigation the Court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one. At one time the Common Law Courts acted very firmly upon the view that, if an attorney took upon himself to sue or defend, the Courts would presume his authority and not inquire into it; so much so that, if an attorney (being a solvent person) without authority instituted or defended proceedings, the Court would not interfere, but left the party injured to his remedy in damages against the attorney.'

Later on he says (p. 234):

"It is in my opinion essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client; if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorised in what he said or did, and it would be impossible to conduct legal business upon footing now existing; and, whatever the legal liability may be, the Court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority."

In *Simmons* v. *Liberal Opinion Limited*, *Dunn*, In re (3) it was held that a solicitor assuming to act for one of the parties to an action warrants his authority and is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing, or has revoked his authority; and the ground of his liability is expressed in these terms by Fletcher Moulton, L. J. (p. 972):

"It has always been held that a solicitor who enters an appearance warrants that he has authority from the client to enter that appearance. This is a matter of importance to the plaintiff, because if that appearance is not entered no action can be carried on. Judgment comes at once, and therefore where there is no existing defendant the plaintiff is not exposed to the costs of an abortive action. This is a principle which has not long been recognised, but it is a principle which is almost a necessity to the procedure in our Courts."

It is argued by Mr. Daphtary that by reason of the procedure obtaining on the Original Side of the High Court under the Civil Procedure Code and the High Court Rules, the solicitors would not be liable as in fact there can never be any representation of their authority to act on behalf of a non-existent person and it cannot be said that they warranted their authority, and for this he has referred us to the various Orders and Rules in the Civil Procedure Code and also to some of the Rules on the Original Side in the High Court Rules. In my opinion there is no substantial difference between that procedure and the procedure prevailing in England except that in this country a suit is instituted by presenting a plaint which has to be signed by the party in person and, if he has a pleader, which would include an attorney, by the pleader, whereas in England a suit is instituted by a writ which it is not necessary for the party or anyone else to sign. But I think this is really a matter of procedure and not a matter of substance, and for this reason, that the signing of the plaint by a party is not an essential condition for the institution of a suit as such, within the meaning of the Civil Procedure Code. The signing of plaints is merely a matter of procedure and the omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court. The defect can be remedied even in appeal.

But I think a short answer to Mr. Daphtary's argument is really this:

According to the procedure prevailing in our Courts, a solicitor has to file an appearance along with the plaint, and an appearance so filed must mean that he is acting on behalf of his client in the conduct of that suit. This then, being one of the first documents which was put on record by Messrs. Payne & Co., I think it must necessarily follow that they warranted their authority to institute and conduct the suit on behalf of the alleged plaintiff. Now even supposing that it cannot technically be said that the suit was brought by Messrs. Payne & Co., it is difficult to see what answer the respondents have to what took place after the institution of the suit.

The events to which I have referred show clearly that shortly after the suit was brought it was pointed out to them that they were acting on behalf of a non-existent person and they were certainly put on inquiry. In spite of that they proceeded with the suit, took part in several interlocutory proceedings, and persisted in maintaining that the contention raised by the appellant was unsubstantial. It is unnecessary to discuss in detail the various points of procedure to which reference has been made on both the sides. But it seems to me that once an attorney is on record the other party is entitled to assume that the suit is filed properly and thereafter he will have no right to correspond or communicate directly with the opposite party and must communicate with his solicitor. One of the grounds on which the liability of a solicitor for costs is put in the English cases is, that, once a solicitor is on record, the opposing party is entitled to look to him, if successful for his costs, if it turned out that the so-called plaintiff is a non-existent person. In my opinion therefore Messrs. Payne & Co. are liable for the costs of the appellants, inasmuch as they were acting in the suit on behalf of a non-existing person, and even though, their honesty and integrity is not in any way impugned. No doubt the position of solicitors is one of responsibility and at times one of great difficulty. But if there are disabilities which at first may appear to be unfair, there are corresponding privileges and powers enjoyed by them, which, apart from their position as officers of the Court they would not have been able to enjoy. One such important privilege which they have is the right to have access to the Court and recover their costs summarily by summons. If then they have the common law rights of lien and other rights, which they have inherited from their brothers in England, then I think they must be prepared to be put under certain disabilities also. For these reasons I agree that the appeal must be allowed with costs.

K.S. *Appeal allowed.*

A. I. R. 1933 Bombay 324

BEAUMONT, C. J. AND RANGNEKAR, J.

Rasoolbibi—Appellant.

v.

Yusuf Ajam Piperdi—Respondent.

Original Civil Appeal No. 43 of 1922, Decided on 14th March 1933, from Suit No. 1229 of 1927.

Mahomedan Law— Will — Sunnis — (Per *Beaumont, C. J.*) **Life-estate and vested remainder can be recognized** (*Rangnekar, J.*, contra).

A sunni lady made a will whereby she gave her property to her daughter who was to enjoy it as the owner as long as she was alive, but she was not to alienate it by way of sale, mortgage, gift, &c. After the daughter's death, the testator's step-son and his descendants were to take the property as absolute owners. The step-son died during the lifetime of the daughter. On the death of the daughter, one of the daughters of the step-son filed an administration suit to administer the estate of her father. A question having arisen as to whether the estate bequeathed formed part of the step-son's estate:

Held : (Per *Beaumont, C. J.*), that under the will the daughter did not take an absolute interest; she took a life interest with remainder to the step-son, but the remainder failed to take effect as the step-son did not survive the daughter: 13 *Bom* 264 & 7 *Bom L R* 306, *held overruled by A I R* 1929 *P C*, 149. [P 327 C 1,2; P 328 C 1]

Per *Rangnekar, J.*—That a vested remainder was not recognized by Mahomedan law, nor a life estate as such could be recognized or created. The grant of a life estate to the daughter operated under the Mahomedan law as a grant of an absolute estate and that she took the property absolutely : *A I R* 1929 *P C* 149 ; 17 *W R* 535; 11 *Cal* 597 (*P C*) ; 17 *Bom* 1 (*P C*) ; 18 *Cal* 164, (*P C*) and 11 *Cal* 597 (*P C*), *could be reconciled.* [P 330 C 2]

Faiz Tyabji and *M. Y. Haindaday* —for Appellant.

K. S. Shavaksh—for Respondent.

Beaumont, C. J.—The question which arises upon this appeal is whether the deceased Haji Ajam, whose estate is being administered, took any and what interest in certain property bequeathed by the will of his step-mother Aishabai

The matter was referred to the Commissioner for taking accounts, who reported that the deceased took no interest in the property. The report was confirmed by Mirza, J., from whose decision this appeal is brought. The parties are Sunni Mahomedans governed by the Hanafi law, and in this judgment references to Mahomedan law are intended to apply only to that law as it affects Sunnis. I have assumed that the property in question forms less than one-third of the property of Aishabai, and that she therefore had a disposable interest over it, though this fact has not been definitely proved.

The will of Aishabai, to which I will refer more in detail presently, in effect gave the property in question to her daughter Hafizabibi for her life and after her death to the deceased Haji Ajam. The property is partly movable and partly immovable, but no distinction exists in Mahomedan law between these two classes of property. Aishabai died in 1897, Haji Ajam died in 1919, and Hafizabibi died in 1926. The Commissioner held that under Mahomedan law the gift of a life interest confers an absolute interest, that accordingly Hafizabibi took the entire estate under the will, and that Haji Ajam took nothing. Mirza, J., was of opinion that the view of the Commissioner as to the effect of a life interest under Mahomedan law was really right, but that he was precluded from so holding by the decision of the Privy Council in *Amjad Khan* v. *Ashraf Khan* (1), but he held that, even if the will did not confer an absolute interest on Hafizabibi, the remainder to Haji Ajam expectant on the death of Hafizabibi failed on his death in her lifetime, and that accordingly Hafizabibi took the estate as heir. The learned Judge expressed the opinion, not necessary for the decision of the case, that if the gift to Hafizabibi for life did not confer an absolute interest it was wholly void. In this Court Mr. Tyabji, himself the author of a learned work on Mahomedan law, has argued, first, that this is a usufructuary will, giving the property to Haji Ajam, and the use only to Hafizabibi during her life, and that such a disposition is valid by Mahomedan law ; in the alternative he has contended that if on its true construction the will confers a life interest on Hafizabibi with remainder to Haji Ajam, there is nothing in Mahomedan law to prevent such a disposition from taking effect according to its terms.

On the other hand, Mr. Shavaksha for the respondents has argued, first, that the rule of Mahomedan law is that a gift by will of a life interest confers on the legatee an absolute interest and that the Privy Council has not altered this rule ; in the alternative he has argued that there is no such thing known to Mahomedan law as what in English law is called a vested remainder, and that Haji Ajam, having predeceased the tenant for life, took nothing, the estate devolving upon Hafizabibi as the heir of the testatrix.

Mr. Tyabji in support of his first point that this is a usufructuary will has referred us to passages in Hamilton's Hedaya and in Baillie which show that Mahomedan law recognizes a gift of property to one and a gift of the use of that property to another. In order to determine whether the gifts in Aishabibi's will are of this nature it is necessary to look at the exact terms of the will. The material clauses are Cls. 6 and 7 which have been translated in Ex. A in the following manner:

"6. After the expenses mentioned above are incurred as to whatever movable property belonging to me may remain as surplus, the aforesaid Bai Hafizabibi is the owner thereof. She is at liberty to deal with the same in any way she likes. The authority and ownership in respect thereof rests in her. My said daughter has no issue. That being so, as regards the immovable property mentioned above together with the articles and things therein I direct as follows:

"7. My daughter, Hafizabibi aforesaid is, to enjoy the abovementioned oart and the furniture, etc., therein as long as she is alive and she is to enjoy the income thereof.

"As long as my daughter is alive, she is the owner of the said oart. However she cannot alienate the same to anyone for any reason whatsoever by way of sale, mortgage, gift, etc. I appoint her to be entitled to enjoy the same and take the income thereof as long as she is alive. And after her death I appoint the aforesaid boy Ajam the son of Gulam Hussein, as the owner of the said oart and the furniture, etc., therein. Therefore after the death of Hafizabibi the aforesaid Ajam and his descendants whoever may be shall take into their possession the aforesaid oart together with the articles and things therein and they are duly the absolute owners thereof. After the death of Hafizabibi no person other than Ajambhai and his heirs shall have any claim upon the aforesaid oart and the furniture and articles therein. Should anyone make such claim, the same is null and void."

1. AIR 1929 P C 149=116 I C 405=56 I A 213 4 Luck 305 (PC).

I agree with Mirza, J., in thinking that it is impossible to construe these clauses as giving the whole property to Haji Ajam, and the use only to Hafizabibi. Not only is Hafizabibi referred to expressly as the owner of the property during her life, but Haji Ajam is only appointed the owner after her death. In my opinion the will amounts to a gift of the property to Hafizabibi for life with remainder to Haji Ajam, and what we have to consider is the effect of such a gift under Mahomedan law. It is clear that by English law under such a gift Haji Ajam would take a vested remainder which would take effect irrespective of whether he survived the tenant for life or not; but it is by no means clear that the same result follows under Mahomedan law. The view is expressed in many of the leading text-books on Mahomedan law that the effect of a gift for life is to confer an absolute interest on the donee. In Sir Dinshah Mulla's book on Mahomedan Law, 10th Edn., p. 27, the rule is stated that if a gift is made by a Sunni Mahomedan of his property to "A" for life, the condition that "A" shall enjoy only the income of the property for life is void and "A" will take an absolute interest in the property as if no condition were attached to it. The same rule is stated in Sirkar's Mahomedan Law, Part 2, p. 33, and in Amir Ali's Mahomedan Law at p. 140. The view of the text-writers appears to be based primarily on a passage in the Hedaya, Vol. 3, Book 30, Chap. 2, p. 309:

"*Case of life-grant.*—An amree, or life-grant, is lawful to the grantee during his life, and descends to his heirs, because of the tradition before quoted. Besides the meaning of amree is a gift of a house (for example) during the life of the donee on condition of its being returned upon his death. The conveyance of the house, therefore, is valid without any return; and the condition annexed is null, because the prophet has sanctioned the gift, in this instance, and annulled the condition, as before mentioned. An amree moreover is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated."

In construing these old texts the Court must endeavour to ascertain the principle laid down according to the true intent and meaning of the words, and it is often impossible or inappropriate to apply the words in a literal sense to the changed conditions of modern life. The principle laid down in the passage quoted seems to me to be that where there is a gift subject to a condition which is repugnant, the gift remains, and the condition is rejected. The case of amree or gift of property during the life of the grantee on condition that it is to be returned on death is merely an illustration of the principle. In my view the passage quoted was not intended to lay down as a rule of law that whenever a life interest is given, and in whatever form the gift may be expressed, it must be construed as an absolute gift subject to a repugnant condition, so as to defeat in every case the intention of the donor. The normal method of granting a life estate or other limited interest in modern times is not to make a grant of the whole estate subject to a condition, but to confine the estate granted to a limited period, and the passage in the Hedaya seems to me to have no application to a grant in the latter form. There is nothing remarkable in holding that the effect to be given to a testator's manifest attention depends upon the form in which that intention is expressed. I may take an illustration of my meaning from English law. A testator desiring to give his daughter an interest in property during spinsterhood may give the estate to the daughter subject to a condition of forfeiture on her marriage; in such a case the condition would fail as being in general restraint of marriage and the gift to the daughter would remain unfettered, so that the intention of the testator would fail. But if the limitation be to the daughter until she shall marry, the estate comes to an end on the happening of the event, and the testator's intention prevails.

We have been referred to all the cases supposed to support the rule in the text-books beginning with *Mt. Humeeda* v. *Mt. Budlun* (2). They are all discussed in the judgment under appeal and it is not in my opinion necessary to refer to them in detail because I agree with Mirza, J., that in view of the decision of the Privy Council in *Amjad Khan* v. *Ashraf Khan* (1), the rule can no longer be supported, and the view expressed in *Nizamudin Gulam* v. *Abdul Gafur* (3) and *Abdoola* v. *Mahomed* (4), must be considered as overruled. In the

2. (1872) 17 W R 525.
3. (1888) 13 Bom 264.
4. (1905) 7 Bom 306.

Privy Council case the document which had to be construed was a deed by which certain property was given by a Sunni Mahomedan to his wife subject to the condition that she should remain in possession of it for her life and that after her death the property should revert to certain named collaterals. After her death her brother the appellant claimed the whole property as her heir. In the Court of the Judicial Commissioner at Oudh, Ashworth, A. J. C., expressed the view that under the document the wife took an absolute interest. On the other hand Wazir Hazan, A. J. C., in an exhaustive judgment referring to all the cases, came to the conclusion that there was nothing in Mohamedan law to prevent the creation of a life estate. The Privy Council accepted the view that where the intention of the donor was to make a gift to the donee of the corpus of property with a condition attached that the donee should take a limited interest or take it for life, under the Hanafi law the condition would be void and there would be a complete and absolute interest in the property. But they held that the question turned on the true construction of the deed, and that all that the deed purported to give to the wife was a life interest, and that the appellant who claimed as her heir took nothing.

Their Lordships left open the question whether the life estate to the wife was valid, as it was not necessary to decide the question. Mirza, J., doubted the correctness of this decision and followed it with reluctance, but I confess that I do not share either his doubt or his reluctance. I do not see why a Mahomedan should be deprived of a power, found convenient by other communities, of conferring a limited interest in property over which there is an absolute power of disposition, unless the authorities make such a result inevitable. Mirza, J., expressed the opinion that a life estate, if it did not confer an absolute interest, was void under Mahomedan law. It is not necessary to decide that point, but I would say that we were referred to no authority in support of the proposition, and I do not myself agree with the opinion. Mr. Shavaksha endeavoured to distinguish the case of *Amjad Khan* v. *Ashraf Khan* (1) on the ground that the question there arose on a deed and not on a will, and that the wife consented to the deed. But both the learned Judges in the Judicial Commissioner's Court held that the transaction did not amount to a family arrangement, and there was no evidence that the wife contracted to claim no more than a life interest. The principle upon which the Privy Council acted is, in my opinion, as applicable to a will as to a deed inter vivos. In my view therefore Hafizabibi did not acquire an absolute interest under the will.

The next question which arises is whether the remainder to Haji Ajam took effect in view of the fact that he predeceased the tenant for life. On this point the learned Judge held against the appellant, and I agree with his conclusion. The case is, I think, governed by *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5). In that case there was a deed of compromise between a Mahomedan widow and sons of her deceased husband, and it was stipulated that the widow should remain proprietor and that the sons should be entitled to succeed on her death. By English rules of construction, I think the sons would have taken vested interests, but the Privy Council held that such an interest did not seem to be recognized by Mahomedan law, and that it would be opposed to Mahomedan law to hold that the deed created a vested interest in the sons which passed to their heirs on their deaths (which had happened) in the lifetime of the widow.

The case has been treated in the Indian High Courts as an authority for the proposition that the remainderman cannot take unless he survives the tenant for life : see *Abdul Karim Khan* v. *Abdul Qayum Khan* (6), *Harpal Singh* v. *Lekhraj Kunwar* (7), *Abdool Hoosein* v. *Goolam Hoosein* (8). As against these cases Mr. Tyabji relies strongly on *Umes Chunder Sircar* v. *Mt. Zahoor Fatma* (9). In that case by a Mahomedan deed of settlement a husband granted the lands in suit to his wife on condition that if she had a child by him the grant

5. (1885) 11 Cal 597=12 I A 91 (PC).
6. (1906) 28 All 342 =1906 A W N 25 = 3 A L J 131.
7. (1908) 30 All 406 = 1908 A W N 165 = 5 A L J 425.
8. (1905) 30 Bom 304=7 Bom L R 742.
9. (1890) 18 Cal 164 = 17 I A 201 = 5 Sar 507 (PC).

should be taken as a perpetual mokurrari and in case of no child being born as a life mokurrari with remainder to the settlor's two sons. It was held that the two sons took interests like what would be called in English law a vested remainder and that such interests were liable to attachment not being a mere expectancy in succession by survivorship or other mere contingent or possible right or interest within S. 266, Civil P. C., of 1877. The decision is difficult to reconcile with *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5). The fact that the parties were Sunni Mohamedans is not noted in the judgment, and no question relating to Mahomedan law was discussed and none of the texts or authorities were cited. It is, I think, impossible to hold that the Board, three members of whom had been parties to the decision in *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5), intended to differ from the latter decision. The Board no doubt decided that the sons took an attachable interest during the lifetime of the widow, but as both the widow and the sons were alive the question whether the sons would actually inherit if they predeceased the widow did not directly arise.

In my opinion the effect of the will in the present case was to grant a life interest to Hafizabibi with remainder to Haji Ajam, but the remainder to Haji Ajam could only take effect if he survived Hafizabibi, an event which did not happen. He therefore took nothing, and the appeal must be dismissed. Costs of the appeal of respondents 2 and 15 to 23 to be paid by the appellant with liberty to such respondents to have their costs paid out of the appellant's share in the estate in the hands of the Court Receiver, if not recovered from the appellant, and failing payment of the whole or part of the costs in the manner aforesaid, such costs to come out of the estate. Respondent 35 to bear her own costs.

Rangnekar, J.—This appeal arises out of a suit brought by the appellant against two of her brothers and two sisters for the administration of the estate for her deceased father Haji Ajam, and the main question raised in the appeal is as regards the effect of a will executed by a Mahomedan lady. First as to the facts. One Aishabai died in 1897 leaving a will dated 21st November 1882, and leaving her surviving her daughter Hafizabibi and her step-son the said Haji Ajam. Haji Ajam died in February 1919, and Hafizabibi died in December 1926. By an order of reference made on a notice of motion in the suit the Commissioner was directed to ascertain the right, title and interest of Haji Ajam in certain property situate at Rander.

The appellant contended that under the will of Aishabai Hafizabibi had only a life-estate and Haji Ajam took a vested remainder. Respondents 2 A and 2-C, who are the sons of Haji Ajam, argued that under the Mahomedan law a life-estate as such operates as an absolute estate, and therefore Hafizabibi took an absolute estate and on her death they were entitled to take the property as her heirs. They further contended that in any event the Mahomedan law does not recognise a vested remainder, and that Haji Ajam having predeceased Hafizabibi, his heirs as such took no interest in the property. It is conceded that if Hafizabibi took an absolute interest in the property, it would devolve after her death on the sons of Haji Ajam to the exclusion of the daughters. If, on the other hand, it formed part of the estate of Haji Ajam, then all his heirs, both male and female, would succeed to the property in proportion to their shares under the Mahomedan law. It may be stated that the parties to the litigation are Sunnis and governed by the Hanafi School of Mahomedan law. The learned Commissioner held that the intention of the testatrix was only to give a life-interest to her daughter Hafizabibi with a restraint against alienation and the remainder to her step-son Haji Ajam and his heirs, but under the Mahomedan law applicable to the parties the restraint against alienation was void and Hafizabibi took an absolute interest. He therefore held that neither the deceased Haji Ajam nor his heirs had any right, title or interest in the property. To the report of the Commissioner the plaintiff filed exceptions, which came up for hearing before Mirza, J., who dismissed the same and confirmed the report. The learned Judge held that according to the Mahomedan law applicable to the parties the grant of a life-

estate operated as an absolute estate in favour of the donee of the grant, but he felt himself bound by the Privy Council decision in *Amjad Khan* v. *Ashraf Khan* (1), although he did not agree with it, and held that the life-estate given to Hafizabibi could not be regarded as an absolute estate. But he further held that the gift was bad under the Mahomedan law and that the gift over or the vested remainder in favour of Haji Ajam was invalid.

The learned counsel for the appellant has raised three points: (1) that the will of Aishabai is what is called under the Mahomedan law a usufructuary will and that the clause in question granted to Hafizabibi only the use of the property during her lifetime and a bequest of such use was valid and recognised under the Mahomedan law ; (2) even if the will was to be considered as a grant of only a life estate to Hafizabibi, such a bequest was not forbidden by the Mahomedan law and took effect, and the remainder over would take effect after the termination of the prior interest. In other words, on the death of Hafizabibi, the heirs of Haji Ajam who had taken a vested interest would succeed ; and (3) that even if the life-estate as such was not recognised by the Mahomedan law, effect should be given to the intention of the testatrix by holding that there was a bequest of the use of the property.

The material clause of the will is Cl. 7 which runs as follows:

"7. My daughter Hafizabibi aforesaid is to enjoy the abovementioned oart and the furniture etc. therein as long as she is alive and she is to enjoy the income thereof.

"As long as my daughter is alive, so long she is the owner of the said oart. However she cannot alienate the same to any one for any reason whatever by way of sale, mortgage, gift, etc. I appoint her to be entitled to enjoy the same and take the income thereof as long as she is alive. And after her death I appoint the aforesaid boy Ajam, the son of Gulam Hussein, as the owner of the said oart and the furniture, etc., therein. Therefore after the death of Hafizabibi the aforesaid Ajam and his descendants, whoever may be, shall take into their possession the aforesaid oart together with the articles and things therein and they are duly the absolute owners thereof. After the death of Hafizabibi no person other than Ajambhai and his heirs shall have any claim upon the aforesaid oart and the furniture and articles therein. Should anyone make such claim, the same is null and void."

If this will had to be construed according to the English law, it is clear that Hafizabibi took a life interest in the property and Haji Ajam a vested remainder. The question really is what is the position under the Mahomedan law ? With regard to the first contention, I entirely agree with the learned Judge that the will was not a mere usufructuary will conferring upon Hafizabibi the mere "use" of the property, but that she was to take a life-estate in the property and Haji Ajam was to become "the owner" of the property after her death. Mr. Tyabji has referred to good many texts, most of whom, as far as I can see, have been cited in the judgment of the learned Judge. A careful perusal of those texts and the illustrations given show clearly the distinction between a life-estate as such and a mere bequest of use or of service or of produce. Ameer Ali in his Mahomedan Law, Vol. 1, p. 648, says:

"When the bequest is of the rents and profits of a house, and the legatee wishes to occupy it himself he cannot lawfully do so. If the bequest be of the occupancy of a mansion and there is no property besides, the legatee may occupy a third of the mansion and the heirs have no right to sell the two thirds of the mansion in their possession. Neither is the legatee of the occupancy of a house entitled to let it, nor to remove the slaves whose services are bequeathed from the testator's place of residence to another, unless the legatee and his family are in the latter place, when the slave may be taken there for the purpose of serving them." Radd-ul-Muhtar, Vol. 5, p. 680.

In Baillie the subject is treated in Ch. 6, p. 652. Minute rules are given as to how far, for example, a bequest of a service of a slave or of the occupancy of a mansion is to be enjoyed by the legatee. One of the rules is as follows at p. 654: "Neither has a legatee of occupancy a right to let the mansion or slave to hire, according to "use." According to Wilson the chapters in Baillie and Hedaya, dealing with the subject of usufructuary wills, carefully distinguish bequests of the "use" from bequests of "fruit" or "produce" of a slave or house and never advert to the possibility of combining the two rights so as to make up what is commonly called the "usufruct" under the English law. Sircar observes as follows at p. 78:

"A bequest of the produce of an article does not entitle the legatee to the personal use of that article, nor does a bequest of the use entitle him to let it out on hire."

Then he cites Hedaya, Vol. 4, pp. 528 and 529, and then the passage is:

"It is not lawful for the usufructuary legatee of a slave or of a house to let them out for hire."

In the case of a life estate however the whole estate vests in the life tenant for full enjoyment and possession subject to his keeping the reversion unimpaired for the benefit of the reversioner. A life tenant as such can let out the property, can mortgage his life interest, and can even dispose of it by sale. This, it is clear, a usufructuary grantee under the Mahomedan law cannot do. But there is another difficulty in the appellant's way. According to the Hedaya, as translated by Baillie, the following passage appears at p. 664:

"When the service of a slave is bequeathed to one legatee, and his person to another, and the slave is within a third, each legatee is entitled to what has been bequeathed to him respectively. And if the bequest be absolute, the legatee of the service is entitled to it till his death; after which it is to be transferred to the legatee of the person, if he be alive, and if not, then it is to be transferred to the heirs of the testator."

Now, in this case Haji Ajam died before Hafizabibi, so that if Hafizabibi was a legatee of a mere "use" then on the death of Hafizabibi the property must go to the heirs of Aishabai and Haji Ajam's heirs would take nothing. But it was argued by Mr. Haindaday in reply that the translation of the texts in Baillie was incorrect and he got the passage translated by the Court Translator, and the translation runs as follows:

"And if (a man) made a bequest of the service of his slave (to one) and of his person to another and it comes out of the third, then the person is for the legatee of the person and the service for the legatee of the service. So is in Hedaya. And if the bequest is absolute it is valid up to the death of the legatee (of usufruct), then it reverts to the legatee of the person, if there be any legatee of the person, and if there not be one, it goes to the heirs of the testator."

I am unable to see that this makes any difference. The translation in Baillie has never been challenged at any time, and, as far as I can see, this has been accepted by all the texts-writers, including Sircar and Ameer Ali. I agree therefore with the learned Judge that this contention is unsound and must be rejected. This brings me to the second and the main question. The points which arise are, first, whether under the Mahomedan law applicable to the parties it is open to create a life-estate or a life-grant by will; secondly, whether when such life-estate is created it does not operate as an absolute estate, the condition being disregarded; and, thirdly, whether Mahomedan law recognises a vested remainder. The last question, I think, is important, because whatever the nature of the interest of Hafizabibi may be, in order to show that this property formed part of the estate of Haji Ajam it is incumbent upon the appellant to show that a vested remainder as such is recognized by Mahomedan law. On this point I am clearly of opinion that it is not. This is clear from the decision of the Privy Council in *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5), the headnote of which runs:

"Mahomedan law does not recognize vested estates in remainder."

In view of the contention that the opinion there expressed by their Lordships is a mere obiter dictum, it is necessary to examine the facts of the case and the decision of their Lordships. The facts were: One Mouzzam Khan was the owner of certain property and had also purchased certain other property in the name of two of his sons, Abdus Subhan and Abdul Rahman He died in 1850 leaving three widows, Gauhar, Chameli and Bakhtawar, and these two sons. Bakhtawar had also a daughter, Nuran. In 1866 Abdus Subhan brought a suit against Gauharbibi to recover half of one of the villages on the ground that Mouzzam Khan had caused a kabuliyat of the village of the entire taluka to be executed in his name and that of his brother Abdul Rahman. This claim was opposed by Gauharbibi apparently on the ground that the Government had a settlement of the estate on her and had executed a kabuliyat and she herself had been in possession thereof. The suit was compromised by two petitions, one signed by the sons and the other by the daughter, upon which the suit was dismissed by consent. The material portion of the deeds runs as follows (p. 99 of 12 *I. A.*).

"Now, an amicable settlement having been made between the petitioner and his said mother, a deed of compromise is filed this day in the Settlement Court, therefore I, the declarant (mau mukir) commit to writing that (my) mother, Defendant, shall during her life-

time continue as heretofore (ba dastur) to hold possession of and be mistress of the talooka, and manage the estate through agents, but she shall not, without any special emergency alienate any property so as to deprive me of my right and that after her death I, the declarant (mau mukir), and my step-brother, Abdul Rahman, shall possess and enjoy each one half of the entire ilaka, situate in the districts of Sultanpur and Partabgarh, and that so long as the defendant may be living I shall obey her."

The second petition of Gauharbibi was similar to the above except that the following words were added after the names of Abdul Rahman and Abdus Subhan, viz., "shall become successors to and proprietors of the said ilaka." Thereafter Abus Subhan died in 1868 and Abdul Rahman in 1874 leaving a daughter Muradi. After his death Gauharbibi executed a deed of gift in favour of Muradi, and shortly thereafter she died. The contest in the suit, which was the subject of the appeal, was between the persons claiming through Gauharbibi and the persons claiming through the daughter of one of the other widows of Mouzzam Khan, and the question was what was the nature of the estate of Gauharbibi. The Subordinate Judge held that Abdul Rahman and Abdus Subhan having died in the lifetime of Gauharbibi they never acquired any estate in the suit property and the devolution of the property was subject to the Mahomedan law of inheritance. In appeal the Judicial Commissioner held that the effect of the compromise was to give Gauharbibi a life interest in the property, and reversed the decree of the Subordinate Judge. In the Privy Council it was contended for the appellant among other things that the petitions of compromise did not operate to cut down Gauharbibi's rights in the property to the life estate and they could not, according to the Mahomedan law, operate to create or evidence any estate or interest of a present vested, reversionary or contingent nature in the property, and that it was not a transaction of gift, but of mutual compromise. Dealing with the question their Lordships observed (p. 100 of 12 *I A*):

". . . . . . Gauharbibi is not merely to have possession of the estate during her life; she is to be mistress (or, as the District Judge has translated the petition, proprietor) of the talooka. During her life, the whole interest in the estate is to be in her. Then comes the question: What is the interest which is given by the compromise to the sons? To give the plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognised by the Mahomedan law."

Further on their Lordships observed as follows (p. 102 of 12 *I A*):

"Their Lordships do not take this view of the compromise. In *Mt. Humeeda* v. *Mt. Budlun* (2), in which judgment was given by this Committee on 26th March 1872, the High Court of Calcutta had held that, by an arrangement between the plaintiff, a Mahomedan widow, and her son, an estate was vested in the plaintiff for life, and after her death was to devolve on her son by way of remainder, but their Lordships held that the creation of such a life estate did not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction They thought that expressions from which it might be inferred that the plaintiff was to take only a life interest might be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death. Their Lordships think this the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in Abdul Rahman and Abbus Subhan which passed to their heirs on their death in the life-time of Gauharbibi."

Undoubtedly, the question which arose was as to the nature of the interest of the two sons, and depended upon the construction of the compromise. But one party contended that Gauharbibi had a life-estate and that the sons had taken vested remainder, and though their Lordships held that the sons only took a contingent interest, their Lordships held clearly that even supposing the sons had taken vested interest, such vested interest could not be recognised under the Mahomedan law. I may mention that this decision has always been understood in this country as an authority for the proposition that the Mahomedan law does not recognise a vested remainder: see *Abdul Karim Khan* v. *Abdul Qayum Khan* (6), *Harpal Singh* v. *Lekhraj Kunwar* (7) and *Abdool Hoosein* v. *Goolam Hoosein* (8). This really is sufficient to dispose of the appeal. But the question on which a good deal of argument is concentrated is whether there is anything in the Mahomedan law applicable to the parties which prohibits the creation of a life-estate, or, to put it the other way, whether the gift of a life estate operates as an absolute estate. Now it is true there are no specific texts on this point either one way or the other in the chapters

dealing with the subject on wills in the Mahomedan law books. But the general principles which apply to gifts are also applicable to the case of wills, and there is a good deal of literature in the texts dealing with gifts which seems to apply equally to the case of wills. These texts are cited in the judgment of the learned Judge and I shall only refer to some of them. Thus in Hedaya, Book 30, Ch. 2, (Charles Hamilton's Translation of Hedaya, Vol. 3, p. 308), it is said:

". . . . neither gifts nor charities are affected by being accompanied with an invalid condition, because the Prophet approved of Amrees (gift for life), but held the condition annexed to them by the grantor to be void."

The author's note to this is :

"The condition of restoration upon the demise of the grantee."

The Hedaya continues (p. 309):

"An Amree, or life grant, is lawful to the grantee during his life, and descends to his heirs, because of the tradition before quoted; besides, the meaning of Amree is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. The conveyance of the house therefore is valid without any return ; and the condition annexed is null, because the Prophet has sanctioned the gift in this instance and annulled the condition, as before mentioned. An Amree, moreover, is nothing but a gift and a condition ; and the condition is invalid ; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated."

The passage in Baillie's Digest of Mahomedan Law at p. 517 is as follows:

"So also if he had said, 'This mansion is to thee oomree' (for thy age—oomr), or 'hyatee' (for thy life—hyat), 'and when thou art dead it reverts to me,' in which case the gift is lawful, and the condition void."

The foot-note to this passage runs thus :

"From this it appears that gifts cannot be limited in respect of time, any more than sale (M. L. S., p. 4). But why, it may be asked, is the gift, valid in this case, and not so in that of the rookba ? The reason assigned for this in the Hidayah (Vol. 3, p. 698) is that the Prophet allowed it in the one case, and rejected it in the other."

It is difficult to find any distinction on principle between "a gift to *A* for life and thereafter to *B*," and, "a gift to *A* for life and thereafter to me or to my heirs on *A's* death." Sircar, who is admittedly a great scholar and an authority on Mahomedan law, puts the position in this way (p. 23):

"An umra, or life grant, is lawful to the grantee during his life, and descends to his heirs: Hedayah, Vol. 3, p. 309."

Then at p. 24:

"If he (the grantor) said: 'This mansion is to thee umra (for thy age), or hayati (for thy life), and when thou art dead it reverts to me,' in which the gift is lawful, and the condition void.: Fatwa Alamgiri, Vol. 4, pp. 520 and 521 ; Baillie's Digest, pp. 508 and 509."

Ameer Ali says at p. 140 :

"Under the Hanafi law, a life-grant or 'umra,' if made in terms which imply an absolute gift, takes effect as a hiba, the condition limiting the gift being held void. A gift to *A* for life and remainder to *B* takes effect as an absolute gift to *A*—to use an English expression—gives him an estate in fee."

The foot-note to the above passage is important :

"Ahmed bin Hanbal and others, says the Durr-ul-Mukhtar, have held a rukba to be invalid and an 'umra' to be valid on the authority of a tradition of the Prophet who declared that when a grant is made for another's life he takes it for his life."

These texts and passages undoubtedly show that a life grant with a condition that on the death of the grantee it should revert to the donor was construed by Mahomedan lawyers to have the effect of an absolute grant. The gift was held good and the condition void. On principle it is difficult to find any distinction between a life grant of this nature, or as it is called umri, and a life grant with a condition that on the death of the donee the estate should go over to somebody else, and this does not seem to be disputed. The argument however is, if I understand it correctly, that the word "umri" does not mean a life grant. It means a grant of absolute property subject to a condition of this kind or any other inconsistent condition, and therefore Mahomedan lawyers construed the condition to be void and upheld the gift or grant. The translation of 'umri' as a life grant or 'hayati' for life by Baillie and other writers including Ameer Ali has never been questioned. According to the texts, then, an umri is not, on the face of it, an absolute grant, yet it operates as an absolute grant, and the actual reason for recognizing that an umri operates as an absolute grant is what is called in the Hedaya as tradition and the Prophet's command. In fact in the whole of the texts, to which our attention has been drawn, there is no specific text which seems to show that a life-estate as such with a remainder could be created or recognized in those days. If, then, the validity of an umri depends upon tradition or commandment, it is difficult to see how the question of con-

struing a life grant according "to the intent and significance" could arise.

Then the only question now is whether there is anything in the decided cases which supports the appellant's contention, and I am clearly of opinion that there is no case which has gone to the extent of saying that under the Hanafi law a life estate as such can be recognized or created.

The first case in which the question arose as to the validity of a grant of a life estate under the Mahomedan law is *Mt. Humeeda* v. *Mt. Budlun* (2). In that case there was an arrangement between a mother and her son. The first Court held that the effect of the arrangement was to confer an absolute estate in the property, the subject-matter of the arrangement, on the mother. The High Court held that the mother had only a life estate under the arrangement. Their Lordships of the Privy Council first held that the arrangement set up by the mother was true, and observed that the only question was what was the effect of it. After pointing out that the High Court had made out a new case as regards the nature of the arrangement they observed that the arrangement would be prima facie absolute. Their Lordships then considered the question whether there was any ground that when the son gave up his right, title and interest in the property under the arrangement he gave up only for the life of the mother, and proceeded to observe as follows (p. 527):

"Upon what grounds then ought it to be held that what the son gave up, he gave up for only the life of his mother, retaining the legal reversion in himself? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction."

Later on their Lordships observed that the expressions used were too weak to prove the transaction was improper among the Mahomedans as an alienation of the son for the life of his mother, so that the opinion of their Lordships in this case seems to be that an arrangement under the Mahomedan law which gives a life estate and provides that on the death of the life tenant the estate was to revert to the son was unusual, improper and inconsistent with Mahomedan usage.

The next case is the case of *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5), to which I have already referred, and it is clear from the judgment that *Mt. Humeeda* v. *Mt. Budlun* (2) was approved of and followed by their Lordships of the Privy Council in this case. In *Nizamudin Gulam* v. *Abdul Gafur* (3) a Mahomedan executed a deed called wakf-nama by which he settled his property on wakf on his wife and daughters and their descendants perpetually. He provided for the management and devolution of the property in a certain manner, to which it is unnecessary to refer, but the effect of it was that management was to go on from generation to generation and neither the two wives nor the daughters had the power to alienate the property. The plaintiffs alleging that they were the muttawalis brought a suit to recover possession of the property which was purchased by the defendant at a Court sale in execution of a decree against Tahira, one of the daughters of the settlor. The grounds of their claim, as appears from the judgment, were that the property in question was wakf, and, secondly, that Tahira, the daughter of the settlor, had only a life interest therein. Two points arose, therefore for consideration: (1) whether the property was wakf, and (2) whether the estate of Tahira therein was only a life estate. Their Lordships held that the wakf-nama was invalid. On the second question they held that it was not competent to the settlor to create a life estate and to grant the property to his next of kin upon determination of such life-estate. This is the most direct authority on the point under consideration, and I would cite here the observations of their Lordships, which are as follows (pp. 274 to 275):

"It was not however shown to us how Karimuddin (settlor) could legally create such a life-estate, or grant the property to his next of kin on the determination of the life-estates. In his lifetime he made no grant, for he kept the possession of the property with himself until his death, and on his death his estate would devolve on his heirs, by Mahomedan law; and, as said in the case of *Ranee Khujooroonissa* v. *Mt. Roushum Jehan* (10) the policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. The creation of any life-estate at all appears quite inconsistent with the Mahomedan law: see *Mt. Humeeda* v. *Mt. Budlun* (2). It might be that by consent such an estate might

10. (1876) 2 Cal 184=3 I A 291=3 Sar 629 (PC).

be created, but as a general rule, the donee in such a case would take an absolute estate. "All our masters are agreed that when one has made a gift and stipulated for a condition that is fasid, or invalid, the gift is valid and the condition void. (Baillie's Mahomedan Law, p. 537). So in the Hedaya, 3, p. 309, it is said : "An amree, or life grant, is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition."

This case went in appeal to the Privy Council and the decision of the High Court was confirmed in *Abdul Gafur* v. *Nizamuddin* (11). The case was argued on behalf of the appellant ex parte by Mr. Mayne, who conceded that the case as to wakfnama or settlement could not be supported. He argued however that the deed executed by the owner of the property could be supported as a will on the ground that the heirs had consented to it, and relied, for the purposes of his argument, on *Umes Chunder Sircar* v. *Mt. Zahoor Fatima* (9), to which I shall refer presently. Mr. Mayne's argument was (p. 3) ;

"There was however, the case of grant for life in *Umes Chunder Sircar* v. *Zahoor Fatima* (9)."

Dealing with that point Lord Watson observed as follows (p. 4) :

"He did not dispute that a Mahomedan cannot of himself, by a testamentary writing, either curtail or defeat the legal interests of his heirs; and that a Mahomedan will is therefore imperative with regard to two-thirds of the testator's succession, unless it is validated by the consent of the heirs having interest. Their Lordships do not think the appellants would take any benefit from the document of 1838 if it were construed as the will of Karimudin. It was plainly not his intention to create a series of life rents, a kind of estate which does not appear to be known to Mahomedan law : (see *Mt. Humeeda* v. *Mt. Budlun* (2), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if Tahirabibi had expressly consented to accept the will, she would not have been the owner of a life estate, but a full owner, with prohibition against alienation, which, being void in law, could not affect either herself or her creditors."

Then, as the last part of the judgment shows, their Lordships of the Privy Council approved of the decision of the Bombay High Court on all the points in the case. It was argued by Mr. Tyabji that what their Lordships held was that the intention of the testator was to give to each successive life tenant an absolute estate in fee, but subject to a repugnant condition against alienation of property during each such life. I am unable to accept this argument. The Privy Council has clearly observed in the passage to which Mr. Tyabji refers that the reason for the construction which they place on the will was that a life grant was unknown to the Mahomedan law, and presumably therefore would amount to an absolute estate.

The same question arose in *Abdoola* v. *Mahomed* (4), and there Batchelor, J., held that the creation of a life estate was inconsistent with the Mahomedan law, and where a life-estate was attempted to be created, the donee would take an absolute estate. For this opinion, Batchelor, J., relied on *Nizamudin Gulam* v. *Abdul Gafur* (3) and the observations of Lord Watson in the same case under appeal to the Privy Council. The next case is *Akbar Ali* v. *Abdool Ali* (12). In that case Russell, J., observed (p. 299):

"Now although of course there are many cases which say that under the Mahomedan law applicable to Sunnis a life estate is invalid, the contrary appears to be the case under the law applicable to Shias. I have above referred to Wilson, and I need not set out the other authorities for this inasmuch as Mr. Lowndes conceded, as I have mentioned above, throughout his arguments that a life estate was not invalid according to Shia law. The great difficulty which I have felt in this case has been caused by the case of *Umesh Chunder Sircar* v. *Mt. Zahoor Fatima* (9), because that case appears to me to be quite contrary to the case of *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5), which was not referred to in *Umesh Chunder* v. *Mt. Zahoor* (9)."

The learned Judge after pointing out the difficulty in reconciling these two decisions made the following observations (pp. 301 to 302):

"Mr. Lowndes in his argument after I had drawn his attention to *Umes Chunder Sircar* v. *Mt. Zahoor Fatima* (9) confessed his inability to reconcile it with *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5). I have found it very difficult to do so and am of opinion that the first line of the head-note in *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5) is stated too broadly. In my opinion it should be stated that Mahomedan law does not recognize vested estates in remainder with all their consequences. To reconcile *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5) with *Umes Chunder Sircar* v. *Mt. Zahoor Fatima* (9) I think the proposition would have to be stated thus:

Under the Mahomedan law applicable to Shias (thereunder life-estates are recognized) the estate of a tenant for life will not devolve upon the remainderman unless the latter survives the former. The estate of the remainderman cannot be said to vest in him—to use the expression of

11. (1892) 17 Bom 1=19 I A 170 (PC).

12. (1907) 9 Bom L R 295.

English law—so as to pass to his heirs in the event of his decease during the lifetime of the tenant for life."

The view taken in this case has been approved of in *Abdul Karim Khan* v. *Abdul Qayan Khan* (6) and *Mahomed Shah* v. *Official Trustee of Bengal* (13). I may also refer to *Prince Suleman* v. *Darab Ali Khan* (14). The question raised there was as to the effect of a deed executed by a Mahomedan lady. The first was that there was no absolute bequest but a mere expression of wish; secondly, that it was a specific bequest of the legacies to be paid out of a certain specific fund and no other, and thirdly, that the lady had only a life-estate in the funds, and, therefore could not exercise any testamentary power over it. Their Lordships disposed of the appeal on the first two questions and made the following observations with regard to the third (p. 122 *of* 8 *I A*):

"At the same time their Lordships think it right to guard themselves against it being supposed that they assent to the proposition that, even if this had been a specific legacy payable out of the specific fund mentioned, it would have been invalid. Their Lordships are by no means satisfied that the gift to this lady of these Government promissory notes subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not according to Mahomedan law, in its legal effect a gift to her absolutely, the condition being void."

I now come to the two decisions of the Privy Council on which the learned counsel for the appellant has relied. The first is the case which I have already mentioned, *Umes Chunder Sircar* v. *Mt. Zahoor Fatima* (9). The facts in that case were that a Sunni Mahomedan granted a mukarrari lease of a certain property at an annual rent of Re. 1 to his second wife with a condition that if she died childless it should go to his son by his predeceased wife. A decree-holder attached the interest of the son under the deed. At that date the second wife had no child. The grantor died thereafter, and after his death the interest of the son was brought to sale, and the main question in the case was whether the interest given to the son under the deed was liable to be attached. Their Lordships held that the son took under the deed a definite interest like what is called in the English law a vested remainder only and that it was liable to be displaced in the event of there being a son after the grantor by his second wife and that it was not a mere expectancy or a mere contingent or possible right and it was therefore liable to be attached and sold in execution of the decree. I confess I share the difficulty which I have pointed out Russell, J., experienced in reconciling the decision with that in *Abdul Wahid Khan* v. *Mt. Nuran Bibi* (5). After giving my best consideration to the matter it seems to me that this decision must be restricted to the facts of that case. In the first place this was not a case of a pure hiba but of a hiba-bil-iwaz. In the case of a hiba-bil-iwaz the rule that it is not competent to the donor to make a gift of a life-estate and give a vested remainder to somebody else does not apply. Secondly, no rule of Mahomedan law was referred to in this case and it was decided under S. 266, Civil P. C., then in force, the point being whether the interest taken by the son was a mere expectancy or a definite interest liable to be divested. Their Lordships held that it was a definite interest liable to be divested in the event of a son being born. Then just after this case the Privy Council had before them another case, namely, *Abdul Gafur* v. *Nizamudin* (11). Mr. Mayne was counsel in both the cases, and in the course of his argument in the latter case he relied on *Umesh Chunder Sircar* v. *Mt. Zahoor Fatima* (9). Their Lordships however did not accept the authority of that case nor referred to it as a decision that under the Mahomedan law it is competent to create a vested remainder

Lastly, it may be pointed out that the son was actually alive at the date of the attachment. Perhaps the best method of reconciling the two decisions is to adopt the one followed by Russell, J., in *Akbar Ali* v. *Abdool Ali* (12), to which I have already referred. The second case, on which Mr. Tyabji has relied and on which he has laid considerable stress as overruling all previous decisions to which I have referred, is *Amjad Khan* v. *Ashraf Khan* (1). The facts there were that a Sunni Mahomedan of the Hanafi school executed a deed stating that he made a gift without consideration of his entire property to his wife, subject to the

13. (1909) 36 Cal 431=2 I C 292.
14. (1881) 8 Cal 1=8 I A 117=4 Sar 267 (P C).

condition that she should remain in possession of a share worth Rs. 5,000 with full power to alienate it, and that as to the rest, worth Rs. 10,000, she should not have power to alienate but should remain in possession during her lifetime, and that after the donee's death the entire property gifted away should revert to named collaterals. The deed itself recites that to the disposition thus made the consent of the donees and collaterals was obtained. Upon the death of the donee her brother claimed the whole property as heir. He contended that the intention shown by the deed was to make a gift of the whole property itself subject to a restrictive condition, and that under the Mahomedan law the gift was valid, but the condition void. The Subordinate Judge held that the deed was in the nature of a family settlement and that the wife took absolute interest in one-third of the property. On appeal Ashworth, A. J. C., held that under the Mahomedan law the deed operated as a gift of an absolute estate. Wazir Hasan, A. J. C., took the view that the wife took a life-estate and that under the Mahomedan law such a gift was valid and could not operate as a gift of an absolute estate. Both the learned Judges rejected the finding of the trial Court that the deed was in the nature of a family arrangement. In one part of his judgment however Wazir Hasan, A. J. C., observed as follows: *Amjad Khan* v. *Ashraf Khan* (15) (p. 120 *of* 2 *O. W. N.*):

"Apart from trust, the transaction may be looked at from another point of view. It is not a simple gift but a contract for consideration which has moved from both sides as shown above."

Their Lordships of the Privy Council accepted the conclusion of the learned Judicial Commissioner as to the construction of the deed, but expressed no opinion on the question at issue in this case whether the grant of a life-estate was valid and whether it necessarily operated as a grant of an absolute estate. As pointed out above, Mirza, J., accepted the learned counsel's argument that this decision overrules all the previous decisions to which I have referred. With great respect to the learned Judge, I do not agree. In my opinion the question whether a life-estate operates as an absolute estate or not was expressly left over by their Lordships of the Privy Council, who, as far as I can see, held on the construction of the deed that in that particular case the grant of the life-estate was valid, basing their judgment on the terms thereof. The arguments show what the case was which was presented to their Lordships. It was argued that a Mahomedan can create a life-estate by contract, but it was not established that the deed was the result of arrangement among the family. Then in reply the appellant's counsel said (p. 215 *of* 56 *I. A.*):

"The statement by the Board in *Humeeda* v. *Budlun* (2) that the creation of a life estate 'does not seem to be consistent with Mahomedan law' is relied on as a reason for construing the present deed as being what its language states —namely, 'a gift of the entire property subject to the condition' expressed."

At p. 219 (*of* 56 *I. A.*) their Lordships observed:

"The principle on which the plaintiff relied was that where it is clear that the intention of the donor is to make a gift to the donee of the corpus of the property comprised in the gift, and there is a condition attached that the donees should take a limited interest or should take it for life, under the Hanafi law the condition would be void and there would be a complete and absolute gift of the property: in other words, it was argued that if a gift of tangible property is made subject to a condition inconsistent with full ownership on the part of the donee of the thing given, the gift is valid, but the condition void: see Wilson's Digest of Anglo-Muhammadan Law, Edn. 1908, para. 315."

Then their Lordships distinguished the case of *Mt. Humeeda* v. *Mt. Budlun* (2) and observed as follows (p. 220 *of* 56 *I. A*):

"Other authorities were referred to during the course of the argument, but in their Lordships' opinion it is not necessary to refer to them in detail, for the reason that the above mentioned principles were not disputed by the learned counsel for the defendant-respondents: their case was based on the argument that the subect-matter of the gift in the deed of 17th January 1905 was a life interest only in the property and that it was not a gift to the wife of an absolute interest in the property with an inconsistent condition."

Further on at p. 221 (*of* 56 *I A.*) their Lordships observed:

It was however further argued on behalf of the plaintiff that under Mahomedan law, which is applicable to this case, a transfer of a life estate could not be made by means of a gift: in other words, it was argued that under the said law there could not be a transfer of any interest in property by way of gift inter vivos except as an absolute interest. In their Lordships' opinion, it is not necessary to express any opinion on the last mentioned argument, because in view of the construction of the deed which their Lordships

15. AIR 1925 Oudh 568=87 I C 445=28 O C 265 =2 O W N 83.

have adopted, the plaintiff-appellant is on the horns of a dilemma."

Now it seems to me that the dilemma raised by their Lordships at p. 221 is only intelligible on the footing of the case being treated as not being a case of a pure hiba. That it was not a pure hiba is clear from the recital in the deed which shows that the consent of the donees was obtained to it and also from the observations of Wazir Hasan, A. J. C., to which I have referred. It is true that on the face of the judgment there is nothing to show that their Lordships considered the transaction otherwise than a mere hiba. But, on the other hand, their Lordships state that the principles on which the plaintiff relied were not in dispute. They set out the principles and then proceed to consider the terms of the deed. The deed recites the consent of the donees. If all the earlier decisions of the Privy Council, to which I have referred, were intended to be overruled, I should have expected some definite pronouncement to that effect in the judgment. But although those decisions were cited they were not referred to, and properly because the principles laid down in them were never disputed. Finally, there was an exhaustive and learned judgment of Wazir Hasan, A. J. C., before them. The learned Judge had specifically raised the question as to whether there can be a grant of a life-estate and whether such a grant operates as one of absolute estate. He had pronounced a definite opinion on it. His colleague had taken a distinctly opposite view. The question was before their Lordships and yet their Lordships deliberately left it open and expressed no opinion on it.

In these circumstances it is difficult to see how it can be contended that the earlier decisions to which I have referred must be considered to be overruled by the decision in *Amjad Khan's* case (1). In my opinion, the series of decisions, to which I have referred, cannot be considered to have been overruled by this case, *Amjad Khan* v. *Ashraf Khan* (1). Mr. Tyabji also relied on the judgment of Wazir Hasan, A. J. C., in that case. It is unnecessary to consider the judgment in detail. The learned Judge confessed that the question was not free from doubt. After considering the cases and the texts he seems to have felt the difficulty of the situation, as appears from the following observations at p. 123 (*of* 2 *O. W. N.*):

"But if the law of the Mahomedans or of any other class of people must keep pace with progress of society and the multifarious relations arising therefrom interests in property apart from the property itself must be recognized. Are we compelled to hold that if a Mussalman of today desires to carve by way of gift only a particular estate out of his property and retain the rest of it for himself or his heirs he cannot do so and if he does, the gift vests the entire estate into the donee in spite of the intentions of both to the contrary? I have come to the conclusion that the rules of the Mahomedan law do not compel me to so hold."

Undoubtedly, there is no reason why a Mahomedan should not be allowed to transfer a life interest in property with remainder over or any other limited interest in property like other people. But, as far as I can see, the texts do not recognise such a limited grant and lay down a rule of construction which, in deference to the Prophet's commandment, is a part of the law. The cases to which I have referred and by which we are bound also lay down the same proposition. Our duty is to apply the Mahomedan law to the Mahomedans, and if there is a defect or a hardship, the remedy would be by way of legislation. In my opinion therefore the grant of a life-estate operates under the Mahomedan law as a grant of absolute estate, and Hafizabibi took the property absolutely. Mr. Tyabji relies on *Banoo Begam* v. *Mir Abad Ali* (16). In this case the parties were Shias, and there is no question that according to the law applicable to them a life-estate as such can be created, and invested remainders are good. It is true that Sir Lawrence Jenkins understood the case of *Umes Chunder Sircar* v. *Mt. Zahoor Fatima* as affirming of possibility of the creation by a Mahomedan of a definite interest like what we should call in English law vested remainder, but in the following sentence observes as follows (p. 178):

"Now here we have to do with Shias and not with Sunnis, and where they are concerned the creation of life-interest is allowed."

At p. 180 the learned Chief Justice observed as follows:

"Therefore what weighed with their Lordships of the Privy Council in *Mt. Humeed's* case (2) and *Abdul Wahid Khana's* case (5) has no application, for it would not be correct to extend to Shias the proposition that the creation of a life-

16. (1907) 32 Bom 172=9 Bom L R 1152.

estate did not seem to be consistent with Mahomedan usage."

In the result the appeal fails and must be dismissed with costs.

R.K. *Appeal dismissed.*

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* A. I. R. 1933 Bombay 338

WADIA, J.

Dhunjibhoy Bomanji—Plaintiff.

v.

Gunpa Khandu Koli and *others*—Defendants.

Original Civil Jurisdiction Suit No. 2222 of 1931, Decided on 1st August 1932.

(a) Interpretation of Statutes—Marginal notes are not to be referred to for construing section.

The Courts have to construe the words of a section as they stand, and a marginal note cannot be referred to in construing the provisions of a section: 26 *All* 393 (*PC*), *Rel. on.* [P 339 C 2]

* **(b) Workmen's Compensation Act (1923), Ss. 12 and 13—Indemnity is restricted under the Act between principal and original contractor and not between contractor and sub-contractor.**

The contractor referred to in S. 12 (2) is the contractor who contracts directly with the principal as defined in S. 12 (1). If there is any further sub-letting of the contract, an indemnity cannot be obtained under the Act and must be sought by recourse to the civil Court. The words "any such" indemnity, are restricted only to one indemnity, namely between the principal and the original contractor: *A I R* 1928 *Cal* 399, *Foll.* [P 339 C 2; P 340 C 1]

(c) Tort—Vicarious liability—Independent contractor explained.

An independent contractor, generally speaking, is one who undertakes to produce a given result or to do a certain work without being controlled by the person for whom he does the work. A contractor executing an independent employment is not the servant of the person who engages his services, and he does not make such person liable for any torts he or his servants have committed. [P 340 C 1]

(d) Workmen's Compensation Act (1923), Ss. 12 and 13—Workmen employed through muccadams—Control of work retained by contractor—Death of workman due to defective materials supplied by contractor—Suit by contractor to recover compensation ordered against him under the Act from muccadams—Contractor held not entitled to recover the same.

The plaintiff had undertaken a contract from a shipping company to ship coal on a boat. They engaged the defendants as muccadams for supplying labour to do the work and supplied them with materials. Due to defective materials supplied by the plaintiff, one of the workmen fell down and met with his death. The workmen, though supplied by defendants, were working under the supervision of the plaintiff's foreman. In a proceeding under the Workmen's Compensation Act, the plaintiff was ordered to pay compensation to the widow of the deceased workman. He filed a suit to recover the amount of the compensation from the defendant:

Held: that even if the defendants were in the position of sub-contractors, the deceased workman was engaged in a work in the performance of which the plaintiff was interested, and the plaintiff was under an obligation under the law to take reasonable care that at the time he supplied the staging and the ropes they were in a state of reasonable fitness and safety for the work for which they were used. The plaintiff could not by employing a contractor get rid of his duty which he owed to the workman, and for the neglect of such a duty he was liable for the injury sustained. Having neglected to use ordinary care, and the injury having ensued by reason of the neglect, he was liable, and the duty which he owed to the workman extended to a danger which was the result of negligence even without any intention on the part of plaintiff. The plaintiff therefore could not claim to recover from them the compensation which he had to pay to the widow. [P 341 C 2]

V. F. Taraporewala and *H. D. Banaji*—for Plaintiff.

A. H. Kirtikar and *S. C. Joshi*—for Defendants.

Judgment.—Plaintiff has filed this suit to recover from the defendants the sum of Rs. 1,225 which he had to pay in the Court of the Commissioner for Workmen's Compensation under the award of the Commissioner dated 22nd July 1931. Plaintiff is the sole contractor in Bombay for the coaling of the steamers of the British India Steam Navigation Co. Ltd., and does business in the name of Bomanji Dhunjibhoy. In June 1931 the plaintiff had to supply 200 tons of coal to the SS. "Hatkhola" then lying in the Victoria Dock, Bombay. It is his case that he gave a sub-contract for the purpose to the defendants who are muccadums at the rate of Re. 1 per ton, and that they in turn engaged several workmen on 11th June 1931 one of whom, named Maruti Bala, fell down from the stage on which he was standing at about 9 in the morning by reason of one of the ropes breaking, and sustained fatal injuries of which he died in hospital two days later. On 8th July 1931, his widow filed an application in the Court of the Commissioner claiming Rupees 1,950 as compensation under the Workmen's Compensation Act (8 of 1923) from Messrs. Mackinnon Mackenzie & Co., the agents of the Steamship Co., for the death of her husband. Messrs. Mackinnon Mackenzie & Co. applied to the Commissioner, under S. 12 of the

Act, claiming to be indemnified by the plaintiff on the ground that the deceased workman was not employed by them, and on 13th July 1931 the Commissioner served the plaintiff with a notice requiring him either to contest the widow's claim or the claim for the indemnity made against him by Messrs. Mackinnon Mackenzie & Co. Plaintiff appeared before the Commissioner on 22nd July 1931, to contest the widow's claim, and the Commissioner awarded her Rs. 1,200 as compensation and Rs. 25 for costs. Plaintiff in turn now seeks to recover the sum of Rs. 1,225 from the defendants together with an additional sum of Rs. 160 which were the costs incurred by him in contesting the widow's claim.

Defendants allege in the first place that the suit is not maintainable. It is their contention that all claims under the Workmen's Compensation Act must be decided by the Commissioner, and a separate suit cannot lie. S. 12 (1) of the Act provides that where a principal in the course of or for the purposes of his trade or business contracts with a contractor for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to the workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him. Applying this section to the parties concerned in this suit, Messrs Mackinnon Mackenzie & Co. would be liable to pay compensation as principal, the plaintiff being the contractor. Under S. 12 (2) of the Act Messrs. Mackinnon Mackenzie & Co. being liable as principal to pay compensation would be entitled to be indemnified by the plaintiff, and the sub-clause provides that:

"all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner."

The question that arises, therefore, for consideration is: What is the remedy of the contractor if he claims indemnity from a person who, he says, is his sub-contractor? Plaintiff has filed this suit against the defendants under the provisions of S. 13 of the Act which provides inter alia that where a workman has recovered compensation in respect of any injury:

"caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid to pay damages in respect thereof, the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid."

The words in the section refer to the legal liability of "some person other than the person by whom the compensation was paid," whereas the marginal note refers to such a person under the term "stranger." The Courts have got to construe the words of a section as they stand, and it has been held by the Privy Council in *Thakurain Balraj Kunwar* v. *Jagatpal Singh* (1), that a marginal note cannot be referred to in construing the provisions of a section. Do those words, therefore, contemplate a sub-contractor? And does S. 12 (2) contemplate only one principal and only one contractor, or a series of contractors and sub-contractors, each contractor standing to his sub-contractor in the relationship of principal to contractor? The matter is not entirely free from doubt, as the words of S. 12 (2) refer to "any such" indemnity. A similar contention came up for decision in Calcutta on a reference by the Commissioner made to the High Court of Calcutta under S. 27 of the Act, and is reported in *Machuni Bibi* v. *Jardiane Menzies & Co.* (2). It was there held that if *A*, after undertaking work which is ordinarily a part of his trade or business, contracts with *B* for the execution of a part, *B* similarly contracts with *C* for the execution of the whole or a part of the work he himself has contracted for and one of *C's* workmen is killed by accident, primarily under S. 12 the person who is liable for compensation is *A*. *A* is entitled to be indemnified by *B*, the contractor who dealt directly with him. But the Act does not provide for the contingency of *B* being indemnified by *C*; and it was therefore held that *B* must seek his remedy in a civil Court of law. The contractor referred to in S. 12 (2) is the contractor who contracts directly with the principal as defined in S. 12 (1). If therefore there is any further sub-letting of the contract, an

1. (1904) 26 All 393=31 I A 132=8 Sar 639 (P C).
2. A I R 1928 Cal 399=113 I C 18.

indemnity cannot be obtained under the Act and must be sought by recourse to the civil Court. The Court held that it might be urged that to hold *C* liable to indemnify *A* would be the construction most workable in practice and might even avoid litigation, but it is also held that it could not read in the Act what was not there. The words "any such" indemnity therefore are according to this decision, restricted only to one indemnity, namely, between the principal and the original contractor. The plaintiff alleges in para 5 of the plaint that he applied to the Commissioner to put in an applicatiom under S. 13, but it was disallowed. The defendants who were not represented before the Commissioner do not admit this allegation, and there is nothing on the record to show whether the application was made and disallowed by the Commissioner. Taking the words of S. 12 (2) and S. 13 together I agree with the construction put upon them by the High Court of Calcutta, and I hold therefore that this suit is maintainable.

If this suit is maintainable, as I have held it is, under S. 13, the next question for determination of the Court is whether the injury to the deceased workman was "caused under circumstances creating a legal liability of some person to pay damages in respect thereof other than the person by whom the compensation was paid," the compensation in this case having been paid by the plaintiff. The circumstances which would create a legal liability on the part of the defendants would arise out of the relationship between them and the original contractor, the plaintiff. Were the defendants sub-contractors, or rather independent contractors? An independent contractor, generally speaking, is one who undertakes to produce a given result or to do a certain work without being controlled by the person for whom he does the work. A contractor executing an independent employment is not the servant of the person who engages his services, and he does not make such person liable for any torts he or his servants have committed, nor is a sub-contractor the servant of the contractor who has employed him. To put it shortly, the question for the consideration of the Court is: Was the deceased workman at the time he received his injuries on 11th June 1931, a workman under tne control of the plaintiff or of the defendants?

Defendants deny that they were sub-contractors or that the deceased workman was in their direct employment when he received the injuries or was in any way employed by them. They say that as muccadams they were asked to engage workmen for the plaintiff, that all the staging, ropes and necessary implements for the work were supplied by the plaintiff, and that the workmen used to work directly under the control of supervisors appointed by the plaintiff. The plaintiff called his manager and constituted attorney Rustomji Kumana to give evidence on his behalf. He stated to the Court that it was he who engaged the defendants as muccadams for the work of coaling the SS. "Hatkhola" at Re. 1 per ton, and that the defendants as muccadams employed the workmen and settled their wages. Defendants, on the other hand, say that they were engaged by one Jamsetji Darukhanawalla who was at the time a foreman in the plaintiff's service, and that it was he who engaged them separately on the morning of 11th June 1931, and asked them to get 50 to 55 men each in order that 100 tons of coal may be bunkered by defendant 1 and another 100 tons by defendant 2. The plaintiff called another witness Mahomed Piren who is also a foreman in the plaintiff's service, and he said that the defendants were engaged by Mr. Darukhanawalla, though he was not aware of the terms of engagement. It is really immaterial for the purposes of this suit by whom the defendants were engaged. There is the word of Rustomji Kumana against the word of each of the defendants and the word of Mahomed Piren, and it certainly seems to me to be more probable that Mr. Darukhanawalla who was on the spot engaged the muccadams for the purpose for which their services were required. What is really material is in what capacity the defendants were engaged or what was their relationship to the plaintiff. (His Lordship then discussed evidence and proceeded.) The deceased was one of the workmen engaged by the defendants, but the question still remains whether he was exclusively subject to the defendant's orders and control in his work.

The plaintiff's case is that he had no control over the work of the deceased, that his agents abstained from personal interference, and that the defendants had the entire control of the work of coaling 200 tons of coal, the mode and the manner of doing it being left entirely to their judgment and their discretion. Both sides have led evidence in order to show the nature and the measure of the control exercised over the defendants' workmen, and I must here observe that the evidence that has been led by the plaintiff is incomplete, and such as has been recorded before me is unsatisfactory. The whole evidence on either side, however, read together shows that the entire control of the work had not been abandoned to the defendants, and the work done by the defendants' workmen was done not only under the supervision of the plaintiff or his agents and for his benefit but also to a large extent under his superintendence and control. A mere supervision or a right to inspect the work in progress or to stop it at any stage or at any time of the day would not be enough to show that the plaintiff had the control. It has been laid down in *Reedie* v. *London and North Western Railway Co.* (3), that even if the employer had the right to dismiss an incompetent workman employed by his contractor, that right would not make the employer liable. It was also contended that the workmen in this case were not engaged directly by the plaintiff, but through the defendants who settled their wages and paid them. (After discussing the evidence, His Lordship proceeded). From all this evidence it appears to me that the defendants as muccadams had not the right to do the whole of the work on their own initiative, but that the workmen engaged by them were under the plaintiff's control. On this point also I believe the defendants' evidence in preference to the plaintiff's witnesses.

There is another point to be considered in this case. Plaintiff says that on 11th June 1931 defendants not only supplied the labour but also the staging ropes, shovels, planks and other implements necessary for the work. Defendants have denied it in their written statement, though they have not done so in the reply given by their advocate to the plaintiff's notice of demand. (After discussing the evidence, His Lordship proceeded). I believe the defendants when they say that the materials were on that day supplied by the plaintiff including the rope that snapped and which was the direct cause of the accident. If that is so, then even if the defendants were in the position of sub contractors, the deceased workman was engaged in a work in the performance of which the plaintiff was interested, and the plaintiff was under an obligation under the law to take reasonable care that at the time he supplied the staging and the ropes they were in a state of reasonable fitness and safety for the work for which they were used: see *Heaven* v. *Pender* (4). He cannot by employing a contractor get rid of his duty which he owed to the workman, and for the neglect of such a duty he is liable for the injury sustained. Having neglected to use ordinary care, and the injury having ensued by reason of the neglect, he is in my opinion, liable, and the duty which he owed to the workman extends to a danger which is the result of negligence even without any intention on the part of the plaintiff. I am also satisfied on the evidence that the defendants were not independent contractors, and therefore, coming back to S. 13 again, the injury that was sustained by the deceased was not caused under circumstances creating a legal liability on the part of the defendants. In that view of the case the plaintiff cannot claim to recover from them the compensation which he had to pay to the widow. In the result, the suit will be dismissed, but as I have held on two important issues in favour of the plaintiff, I order the plaintiff to pay two-thirds of the defendant's costs of the suit.

R.K. *Suit dismissed.*

3. (1849) 4 Ex 244=6 Ry Cas 184=20 L J Ex 65.

4. (1883) 11 Q B D 503=52 L J Q B 702=47 J P 709=49 L T 357.

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WADIA, J.

Pandurang Shamrao Laud and *others* —Plaintiffs.

v.

Dwarkadas Kalliandas and *others*— Defendants.

Testamentary Suit No. 8 of 1932, Decided on 4th August 1932.

(a) Succession Act (1925), S. 247 — Administrator pendente lite and receiver—Distinction enunciated.

The position of an administrator pendente lite is similar to that of a receiver, with this distinction that the administrator pendente lite represents the estate of the deceased for all purposes except distribution. [P 343 C 2]

(b) Succession Act (1925), S. 247—Administrator pendente lite — Appointment of— Essentials stated.

The appointment of an administrator pendente lite under S. 247 is purely discretionary and the Court has to be satisfied as to the necessity of such an administration as to the fitness of the proposed administrator, and that it is just and proper under the circumstances of the case to appoint an administrator before subjecting the estate to the cost of such administration. [P 344 C 1]

(c) Succession Act (1925), S. 247—Bona fide dispute — Necessity made out — Court generally appoints receiver under general jurisdiction—Receiver.

The Court has, apart from the Succession Act, general jurisdiction to appoint a receiver in any case in which it may appear just and convenient to do so. Such appointment cannot be claimed as of right merely because the proceedings are contested; but whenever there is a bona fide dispute and a case of necessity has been made out, the Court in its discretion generally makes the grant. [P 344 C 1]

(d) Succession Act (1925), S. 211—Probate —Effect of, as to executor's title explained— Petition for probate turned into suit—Executor does not represent estate.

The probate of a will is operative only as the authenticated evidence of the executor's title and not as the foundation thereof, for he derives his title from the will itself, and the property of the deceased vests in him from the moment the testator dies. An executor before he proves the will may do almost all acts which are incidental to his office except those relating to suits in connexion with the estate; and when he has filed his petition for probate and the petition is turned into a suit, then while that suit is pending, there is no one legally entitled to receive or hold the assets or give valid discharges. [P 344 C 2]

(e) Succession Act (1925), S. 247—Executor—Appointment of, questioned—Will challenged—Grant of administration pendente lite should be made.

The Court does not as a rule appoint a receiver as against executors whenever they have obtained probate, unless there is gross misconduct or mismanagement and waste on their part. If they are rightly in possession and there is no dispute as to their title they will not be replaced by the Court receiver except on strong grounds. The Court refuses to appoint an administrator pendente lite where there is a person named in the will as executor whose appointment is not questioned and who can discharge the functions of an administrator. But where the appointment of the executors is questioned and their title is in dispute because the will itself is challenged on various grounds, there should be a grant of administration pendente lite: *Mortimer* v. *Paull*, (1870) 2 *P & D* 85, *Ref.* [P 346 C 1]

(f) Will—Proof of—Executor taking large benefit—Suspicion is raised and executor must remove it.

When executors propounding a will take a large and appreciable benefit thereunder, the Court treats the will with suspicion of more or less weight according to the facts of each case, and the onus lies on such an executor to prove to the satisfaction of the Court that the testator understood what he did and that it was his will; and no probate can issue unless the conscience of the Court is satisfied that the person propounding the will has led sufficient evidence which on a close and careful examination entirely removes that suspicion. [P 346 C 2]

(g) Receiver—Party.

It is a general principle not to put a litigating party in position by granting administration pending the suit unless by consent of all parties. [P 346 C 2]

Chimanlal Setalvad, J. D. Davar and *Lalji Gokaldas*—for Plaintiffs.

Jamshed Kanga, F. G. Coltman, V. F. Taraporewala, M. C. Setalwad and *N. P. Engineer*—for Defendants.

Judgment.—This is a notice of motion taken out by the defendants for the appointment of the Court receiver as the administrator pendente lite and receiver of all the movable and immovable properties belonging to the estate left at the death of Putlibai, widow of Runchoddas Tribhowandas Mody, and of the claims and documents referred to in prayer (1) of the notice of motion, and also for an injunction against the plaintiffs in terms of prayer (2) thereof. Putlibai died in Bombay on 25th April 1932, leaving a will dated 30th August 1931, of which the plaintiffs are the executors. Plaintiffs have filed their petition for probate of the said will. Putlibai died childless, and the defendants would be some of her heirs as on an intestacy, and are also the reversionary heirs of her deceased husband. They filed a caveat and have made an affidavit in support thereof with the result that the petition has been turned into a testamentary suit. Defendants allege that the will was obtained by the plaintiffs by means of a fraudulent con-

spiracy between themselves and by the exercise of undue influence, coercion and importunity on the testatrix, and that therefore it is void and of no effect. Under the will plaintiff 4, who is the son of plaintiff 3 gets a specific bequest of ten lakhs of rupees together with the house of the deceased situate at Ridge Road, Bombay, and a bungalow at Mahabaleshwar and also ornaments and jewellery which have been estimated somewhere between two and five lakhs of rupees. There is a bequest of a large amount to charity, and the residue is also given for charitable purposes. Defendants allege that the bequest to charity is illusory, for there will not be much left after paying off the legacies and defraying all the costs of administration. The plaintiffs deny that the bequest is illusory as alleged. Defendants allege that in the latter half of July 1931 the testatrix was taken to Nasik by plaintiffs 2 and 4 and plaintiff 1 and his wife came there later, that she was in bad health that she was kept in duress, and on her return she was made to execute a will on 29th July which was replaced by the will now propounded. Plaintiffs on their side deny each and every one of these allegations, and they contend that the testatrix was a free agent, knew what she was about, and that she was also anxious that defendants should have no benefit under the dispositions contained in her will. All these allegations and counter-allegations will have to be gone into at the hearing of the suit, and I do not wish at this stage to say anything one way or the other which may prejudice the plaintiffs or the defendants in respect of their contentions at the hearing. All that I can say at present is, judging by the number of affidavits put in and their length and the number of statements therein contained, that it will take some appreciable time before the suit is heard and finally disposed of.

Defendants have made their present application under S. 247, Succession Act, which is the same as S. 70 of the old Court of Probate Act of 1857 in England, 20 and 21 Vic. C. 77. S. 70 applied only to personal estate. S. 71 of that Act gave the Court of Probate power to appoint a receiver even of the real estate of the deceased pending the suit, so far as the validity or otherwise of the will might affect the real estate. Both these sections are now, with regard to deaths, occurring after the year 1925, repealed by S. 163 (1), Supreme Court of Judicature (Consolidation) Act of 1925, 15 and 16 Geo. V, C. 49; and S. 247, Succession Act, corresponds to S. 163 (1), Judicature Act of 1925. S. 247 provides that pending a suit touching the validity of the will of a deceased person the Court may appoint an administrator of his estate, and such administrator shall have all the rights and powers of a general administrator other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

In other words the position of an administrator pendente lite is similar to that of a receiver, with this distinction that the administrator pendente lite represents the estate of the deceased for all purposes except distribution. Before granting administration pendente lite the Court has to be satisfied in the first place that there is a bona fide suit pending touching the validity of the will of the deceased. In England proceedings on a caveat do not constitute an action, but here we are governed by R. 632, High Court Rules, which provides that upon the affidavit in support of the caveat being filed, the petitioner for probate shall be called upon by notice to take out a summons, and the proceedings shall be turned into a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant. The caveat having been filed in this case and also an affidavit in support thereof, there can be no doubt that there is a lis pendens in this Court. Secondly, the Court, before exercising its jurisdiction to grant administration pendente lite, has also to be satisfied whether there is a necessity for such a grant. In *Rendall* v. *Rendall* (1) it was held by the Vice-Chancellor that where no probate or administration had been granted, a receiver was appointed as a matter of course pending a bona fide litigation in the Ecclesiastical Courts to determine the right to probate or administration unless a special case for not doing so had been made

1. (1841) 1 Hare 152=11 L J Ch 93.

out. In *Bellew* v. *Bellew* (2) Sir J. P. Wilde intimated that he would not in future follow the established practice of requiring a case of necessity before making a grant of administration pendente lite, but would make it whenever the Chancery Court would have appointed a receiver, and that he would in future appoint an administrator pendente lite where a bona fide suit was pending irrespective of the property of the deceased being in any particular danger.

We are however governed by S. 247, Succession Act, and the appointment is purely discretionary, as the word "may" in the section clearly indicates, but that discretion has to be exercised judicially and not arbitrarily. In my opinion, the Court has to be satisfied as to the necessity of such an administration and as to the fitness of the proposed administration, and it must also be satisfied that it is just and proper under the circumstances of the case to appoint an administrator before subjecting the estate to the cost of such administration. The Court has, apart from the Succession Act, general jurisdiction to appoint a receiver in any case in which it may appear just and convenient to do so. Such an appointment cannot be claimed as of right merely because the proceedings are contested, but whenever there is a bona fide dispute and a case of necessity has been made out, the Court in its discretion generally makes the grant. Counsel for the plaintiffs relied on a Calcutta decision in *Jogendra Lal* v. *Atindra Lal* (3). In that case the District Judge appointed an administrator pendente lite, but his order was set aside by the High Court of Calcutta. According to the facts of that case the caveator, who was the grandson of the testator, had raised no objection in the probate proceedings to the appointment of the appellant who was the son of the testator as an executor, nor did he raise any objection to the son acting in his capacity as executor, nor did he for more than one year between the death of the testator and the application for probate take any objection to the estate of the deceased remaining in the hands of the executor, nor did he object for four months even after the application for probate had been made. Various charges were made against the executor.

The District Judge dealt with all of them, and held that none of them was proved. Nevertheless, the District Judge made an order appointing an administrator pendente lite on the ground that the accounts of the estate did not seem to him to have been properly kept by the executor, which ground was not even taken by the caveator. Each case must depend upon its own facts, and upon the facts of that case the appeal Court came to the conclusion that no necessity for the appointment of an administrator pendente lite had been made out. Under S. 211, Succession Act, an executor is the legal representative of the deceased for all purposes, and all the property of the deceased vests in him even before probate is granted. The probate of a will is operative only as the authenticated evidence of the executor's title and not as the foundation thereof, for he derives his title from the will itself, and the property of the deceased vests in him from the moment the testator dies. Under S. 213 however no right as executor can be established in any Court of justice without inter alia a grant of probate, and under S. 214 no Court can pass a decree against an heir of a deceased person for payment of his debt to any person who does not hold either probate or letters of administration or a succession certificate. It follows therefore that an executor before he proves the will may do almost all acts which are incidental to his office except those relating to suits in connexion with the estate; and when he has filed his petition for probate and the petition is turned into a suit as in this case, and while that suit is pending, there is no one legally entitled to receive or hold the assets or give valid discharges.

As was pointed out in *Watkins* v. *Brent* (4), there is no doubt that if the representation to the estate is in contest, and no person has been constituted executor, the Court interferes not because of the contest, but because there is no proper person entitled to receive the assets. In this case the representation to the estate of the deceased Putlibai is in contest, and

2. (1865) 34 L J P 125=4 Sw & Tr 58=11 Jur N S 588=13 L T 247.
3. (1911) 2 I C 638.
4. (1835) 1 Mylne & Craig 97=7 Sim 512=5 L J Ch 49.

without saying anything with regard to the merits of the allegations and counter allegations made in the suit, there can be no doubt that a bona fide litigation is pending between the parties.

The question which then arises is whether the necessity for a grant of administration pendente lite has been made out, and if it is, who should be appointed administrator pendente lite? It appears that within a week after the death of the deceased, plaintiffs themselves filed a petition in this Court stating that it was necessary for the preservation of the estate that letters of administration may be granted to them under S. 253 limited to the collection and preservation of the estate and the giving of discharges for debts and claims due to the estate, but the petition was dropped. Plaintiffs say in one of the affidavits that the reason for dropping the petition was that the application was thought unnecessary as there was no real difficulty in recovering the debts and outstandings, and that as a matter of fact that had been done. Defendants on the other hand allege that the reason was that they objected and wanted letters of administration to be granted to the Court receiver instead of to the plaintiffs, to which the plaintiffs objected. This allegation made by the defendants in para. 28 of their affidavit in support has not been specifically denied. The gross value of the estate, according to the schedule to the petition for probate, is about thirty-two lakhs of rupees, and deducting the amounts and liabilities payable under the consent decree in Suit No. 1869 of 1930 which was filed by defendant 2 in respect of the estate of Ranchhoddas Tribhowandas Mody, the deceased husband of the testatrix, the estate is valued at about rupees twenty-three lakhs. The estate mainly consists of Government securities the value of which with interest is estimated at rupees two lakhs, of shares of various companies which together with dividends are valued at about rupees two and a half lakhs, immovable properties worth about rupees four lakhs, and a large number of claims under mortgages, four of which were taken in the name of Ranchhoddas Mody and about thirteen in the joint names of Ranchhoddas Mody and his wife, the testatrix.

In respect of the mortgages standing in these joint names about eleven suits were filed by the receiver appointed in that suit, and in place of the Court receiver who filed them the name of the testatrix was subsequently substituted, and the testatrix and plaintiff 3 were appointed joint receivers without security and without remuneration. Amongst these mortgages are mortgages executed by plaintiff 1. It appears that he had equitably mortgaged his properties at Queen's Road and Haines Road to Ranchhoddas Mody for Rs. 2,11,980 and Rs. 71,815 respectively with interest. The due date having expired, the time for payment was extended. Thereafter plaintiff 1 took reconveyances of the property from the testatrix about the end of December 1931 when the mortgage debt with interest stood at over three lakhs of rupees, and on the same day plaintiff 1 executed fresh equitable mortgages for the said amounts in favour of the testatrix. It was alleged, when the notice of motion was argued that interest on these mortgages for seven months had been in arrears, but I have now been informed that since the argument commenced plaintiff 1 has paid up all the arrears of interest.

Interest is also due by other mortgagors. Rents havealso to be recovered, and the testatrix and plaintiff 3 having been appointed joint receivers, plaintiff 3 in the absence of a fresh order appointing him sole receiver is not in law entitled to recover the rents which, according to the affidavits, amount to about Rs. 6,000 per month. It is also alleged that dividends have not been recovered. It is further alleged that books of account are in the plaintiffs' possession. It was also contended that if suits were filed by the executors no decrees could be passed pending the grant of probate. There is no dispute that various suits are pending, and that suits may have to be filed and interest and rents and dividends recovered, and there is also a large residue in favour of charity. The estate is of considerable value and extent, and for the safeguarding and preservation of it proper arrangements ought, in my opinion, to be made, especially when very wide discretionary powers have been given to the executors under a will

which if challenged by parties who are interested in the estate.

The next question is what arrangement should be made. The general principle is that the Court does not as a rule appoint a receiver as against executors whenever they have obtained probate, unless there is gross misconduct or mismanagement and waste on their part. If they are rightly in possession and there is no dispute as to their title they will not be replaced by the Court receiver except on very strong grounds. Their appointment itself shows that the testator had confidence in them, and the Court gives effect to the expression of the confidence reposed in parties by one who knew them best. It has also been held that the Court refuses to appoint an administrator pendente lite where there is a person named in the will as executor whose appointment is not questioned and who can discharge the functions of an administrator: see *Mortimer* v. *Paull* (5). In this case however the appointment of the executors is questioned, and their title is in dispute because the will itself is challenged on various grounds. Under the circumstances there should be, in my opinion, a grant of administration pendente lite.

The last question is who should be the administrator or administrators pendente lite? I have to be satisfied as to the fitness of such an administrator or such administrators. Plaintiff 1 is a solicitor of this Court and has prepared the will, and if he was the sole executor the Court would appoint a receiver of the estate as was done in *Hamilton* v. *Girdleston* (6). There are however co-executors along with plaintiff 1. But nevertheless plaintiff 1 is a debtor to the estate of the deceased. He claims a large sum of costs against the estate and says in his affidavit that he informed the testatrix that he would claim his professional costs even if he acted as executor which he would be entitled to. It has however been held by the Privy Council in *Bai Gungabai* v. *Bhugwandas Valji* (7), that the insertion of a clause that the solicitor executor should charge for his professional work hardly raises any suspicion about the genuineness of the will. In view however of the position in which plaintiff 1 stands to the estate, his interests are to a large extent in conflict with his duties. Plaintiff 2, it is alleged, was a share-broker and an estate broker, and though at present he is in affluent circumstances, the allegation against him is that he is a friend of the other plaintiffs and has helped them in getting the testatrix to execute the will. This of course is an allegation which will have to be substantiated at the time of the hearing. Plaintiff 4 is a young man of about twenty to twenty-five years and is the son of plaintiff 3 and lives with his father, and plaintiff 4 gets a legacy of between twelve to fifteen lakhs of rupees under the will.

It is a well-known principle that when executors propounding a will take a large and appreciable benefit thereunder, the Court treats the will with suspicion of more or less weight according to the facts of each case, and the onus lies on such an executor to prove to the satisfaction of the Court that the testator understood what he did and that it was his will, and no probate can issue unless the conscience of the Court is satisfied that the person propounding the will has led sufficient evidence which on a close and careful examination entirely removes that suspicion. This has been laid down in a series of cases such as *Barry* v. *Butlin* (8); *Vellasawmy Servai* v. *Sivaraman Servai* (9); *Rangavva* v. *Sheshappa* (10) and *Mallappa* v. *Tipava* (11). The same principle has also been laid down in the case cited to me in *Bai Gungabai* v. *Bhugwandas Valji* (7). I have carefully considered whether the plaintiffs or any one or two or more of them should be appointed administrator or administrators pendente lite, and there is also the offer made to me through their counsel that they are willing to give security. It is however a general principle, though not an absolute rule of law, not to put a litigating party in position by granting administration pending the suit unless

5. (1870) 2 P & D 85=39 L J P 47=18 W R 901=22 L T 631.
6. (1876) W N 202.
7. (1905) 29 Bom 530=32 I A 142=8 Sar 813 (P C).
8. (1838) 2 Moore P C 480 (P C).
9. A I R 1930 P C 24=121 I C 230=57 I A 96=8 Rang 179 (P C).
10. A I R 1927 Bom 228=101 I C 416=51 Bom 258.
11. A I R 1930 Bom 539=128 I C 545.

by consent of all parties, and in my opinion this is not a case in which I should make an appointment out of the plaintiffs. In saying this I wish to make it clear that the Court is making no imputation whatsoever against the plaintiffs or any of them. An instance was cited to me in which the late Russell, J., in T. & I. J. 8 of 1903, appointed one of the executors of a disputed will along with another administrator pendente lite, but, as I have said before, each case must stand on its own facts and circumstances, and the facts and circumstances in that case are not before me. It is, in my opinion, in the interests of all parties to appoint an impartial person as an administrator pendente lite, and the Court receiver is an officer of the Court who is independent of and is bound to be indifferent between the contesting parties. Moreover under S. 247 all powers that he exercises are subject to the immediate control of the Court and he acts under its direction.

Under the circumstances, I will make an order in terms of prayers (1) and (2) of the notice of motion. Costs of all parties to come out of the estate of the deceased Putlibai, those of the executors as between attorney and client. It is agreed between the parties that plaintiffs 3 and 4 should remain undisturbed in occupation of the Ridge Road house and the contents thereof including the motor-car subject to the rights and contention of the parties. I further direct the receiver not to take possession of the family idol or idols at present until the further orders of the Court. Receiver to act on the Prothonotary's certificate.

R.K. *Receiver appointed.*

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BEAUMONT, C. J. AND MURPHY, J.

Chhotalal Natharam Pandya—Applicant.

v.

Bai Jayagavri—Opponent.

Civil Revn. Appln. No. 230 of 1931, Decided on 8th February 1933, against order of First Class Sub-Judge, Broach.

Bombay Invalidation of Hindu Ceremonial Emoluments Act (11 of 1926), S. 4—Contract to share Yajmanvriti with another acting as gumasta during pleasure of priest—Death of priest—Emoluments earned by gumasta after death of priest—Suit by widow to recover share when maintainable stated.

In 1911, *C* entered into a contract with *D* to perform latter's duties as priest in certain villages and to share the emoluments from those services. It was agreed that *C* was to work as such, so long as *D* pleased and undertook to work for a minimum term of five years. *D* died in 1927 and *C* continued to work even after the death of *D* and notwithstanding a notice by *D's* widow in 1928 calling upon him to discontinue to work. *D's* widow sued *C* for share of emoluments received by *C* in the years 1929 and 1930:

Held : (1) that in order to be entitled to recover the share of the emoluments the widow must prove either that she entered into a fresh contract with *C* that he would continue to work for her or under her directions on the terms of the original karar so far as applicable, that is, on terms of sharing the emoluments with her, or that the services in respect of which the emoluments were earned by *C* were in effect her property and that *C* in receiving moneys for the performance of these services was accountable to her for those moneys as being moneys had and received to her use ; (2) that any suggestion of implied contract was negatived by notice served in 1928, since the amount claimed referred to those earned after it; and (3) that S. 4 was a bar to her recovering the amount as being her property. [P 347 C 2; P 348 C 1, 2]

U. L. Shah—for Applicant.

R. G. Naik—for Opponent.

Beaumont, C. J.—This is an application in revision against the judgment of the First Class Subordinate Judge of Broach. It appears that in 1911 the defendant entered into a contract with one Devshankar to perform the latter's duties as priest in certain villages and to share the emoluments from those services. The actual agreement is Ex. 27 and it is there provided that the defendant and another man who was in the same position were to work as long as Devshankar pleased as his gumastas and they undertook to work for a minimum term of five years. Devshankar died in 1927 and the plaintiff is his widow. She sues the defendant for the half share of emoluments received in the years 1929 and 1930, that is, since the death of Devshankar. Now, it is perfectly plain that the original contract came to an end, at the latest on the death of Devshankar, because it is to endure only during his will. Therefore if the widow is entitled to recover these sums, as the learned Judge has held, it must be, I think, on one or other of two grounds: either she must prove that she entered into a fresh contract with the defendant that he would continue to work for her or under her directions on the terms of

the original karar so far as applicable, that is to say, on the terms of sharing the emoluments with her, or she must prove that the services in respect of which these emoluments were earned by the defendant were in effect her property and that the defendant in receiving moneys for the performance of these services is accountable to her for those moneys as being moneys had and received to her use. So far as the first point—that of an implied contract—is concerned, there is no evidence of any new contract made expressly, and it seems to me that any suggestion of an implied contract is entirely negatived by Ex. 30, which was a notice given by the plaintiff on 9th May 1928, to the defendant saying :

> "We have brought a man to do the work of priesthood in Vagra, therefore henceforward you should not go to do the work of priesthood in Vagra at anybody's place."

So that, if up to that date the defendant was acting as agent for the plaintiff, that notice put an end to the agency, and the moneys sued for were received after that date. Therefore it seems to me that the plaintiff is driven back upon the other ground of claiming that these moneys received by the plaintiff in respect of services rendered as priest are moneys which in equity belonged to the plaintiff. Now, under the old law these duties of priest were regarded as hereditary, and if the plaintiff could have shown that the right to perform these duties passed on the death of her husband to herself, then I think she would have been entitled to say that the defendant had received rewards for these services on her behalf and was accountable to her. But by S. 4 of Bombay Act 11 of 1926, called the Invalidation of Hindu Ceremonial Emoluments Act, it seems to me that any right which the plaintiff had to the proceeds of these services is taken away, because S. 4 says that no person shall be entitled to claim as a matter of right any ceremonial emoluments from any Hindu who does not call in the services of the person claiming those emoluments, and "ceremonial emoluments" is defined as all perquisites, fees and any other dues claimable by any person for religious ceremonials on account of his being a hereditary priest or an alienee from a hereditary priest. So that if the defendant has received moneys for performing on his own behalf the duties of a priest it seems to me that the plaintiff cannot claim those moneys because they are payable by persons who have not called in her services. The original agreement contains no contract by the defendant not to perform services for any persons for whom he has acted on behalf of Devshankar, and in the absence of any such contract, and in the absence of any proof that the emoluments he has received belonged to the plaintiff, it seems to me that he is entitled to act as priest and to retain for his own benefit the sums which are paid to him. That being so, I think the judgment of the learned Judge was wrong in law and that we must set it aside. Rule absolute: plaintiff's claim dismissed with costs throughout.

V.B./R.K. *Rule made absolute.*

A. I. R. 1933 Bombay 348

BEAUMONT, C. J. AND RANGNEKAR, J.

Narandas Sunderlal Rathi and *another*—Plaintiffs—Appellants.

v.

Ghanshyamdas B. Dalal—Defendant—Respondent.

Original Civil Jurisdiction Appeal No. 60 of 1932, Decided on 31st March 1933, from decision of Mirza, J., in Suit No. 2068 of 1931.

(a) Contract—Teji mandi contracts—Presumption—Contract Act (1872), S. 30.

Presumption is that a teji mandi transaction is not a mere wagering transaction. [P 350 C 1]

(b) Contract — Teji mandi contracts — Member of East India Association entering into contract with constitutent — Refusal to sign contract when option became exercisable—Contract held to be in compliance with bye-law 82 of the Association and enforceable —East India Association bye-law 82 — Contract Act (1872), S. 30.

Plaintiffs were members of the East India Cotton Association; the defendant was their constituent. Plaintiffs entered into teji mandi and mandi contracts with the defendant. On the dates on which the option became exercisable, the defendant against whom the option had gone refused to sign the contract for taking or giving delivery and refused to carry out the terms of the original bargain. The plaintiffs closed the contract and sued to recover the difference from the defendant. Bye-law 82 of the Association, compliance with which was a condition precedent to validity of all such contracts provided "contracts between members acting as commission agents on the one hand and their constituents on the other shall be subject to the bye-laws and shall be in writing"

in the prescribed form "and if the constituent of any such member has agreed to sign the prescribed form of contract but fails or refuses to do so after terms have been arranged, the contract shall be treated in all respects as if the form had been signed, and both parties shall have the rights and remedies accorded by these bye-laws."

Held : (1) that the bye-laws did not require an express agreement and an implied contract was sufficient to bring a case within bye-law 82 ; (2) that when the defendant entered into the transaction he impliedly agreed that the necessary contract as required by the bye-laws would be signed, and (3) that the plaintiff was entitled to recover the amount of outstanding purchase. [P 349 C 2]

(c) Contract—Teji mandi—Presumption. When parties enter into a business transaction such as teji mandi and mandi contracts, they must be presumed to intend to enter into an arrangement which will be enforceable. [P 350 C 1]

Jamshed Kanga and *M. V. Desai*—for Appellants.

K. McI Kemp and *M. S. Vakil* — for Respondent.

Beaumont, C. J. — This is an appeal from a decision of Mirza, J. The plaintiffs are suing for moneys due in respect of certain teji mandi and mandi contracts made between themselves and the defendant. The nature of the contracts, which are contained in Ex. A, is not in dispute. On the dates upon which the options became exercisable, the defendant, against whom the options had gone, refused to sign the contracts for taking or giving delivery, that is to say, he refused to carry out the terms of the original bargain. The plaintiffs are members of the East India Cotton Association, Limited, and if they are to succeed in their claim, they must prove contracts which comply with bye-law 82 of the Association. That bye-law provides that :

"Contracts between members acting as commission agents on the one hand and their constituents on the other shall be subject to the bye-laws and shall be in writing in the form given in the appendix,"

and then it is provided :

"If a constituent of any such member has agreed to sign the prescribed form of contract but fails or refuses to do so after terms have been arranged, the contract shall be treated in all respects as if the form had been signed, and both parties shall have the rights and remedies accorded by these bye-laws."

Now the plaintiffs say that the defendant did agree to sign contracts in the prescribed form, and they rely on part 2 of that bye-law. Various contracts to sign are relied upon by the plaintiffs both express and implied. First of all it is said that there was an express contract at the time the teji-mandi transactions were entered into that the defendant would at the due dates sign the appropriate contracts. As to that the plaintiffs' munim gave evidence, and as far as I can see, there was no cross-examination on that point. The defendant did not go into the witness-box. It is said by his counsel that he was ill. However, the learned Judge did not accept the evidence of the munim of the plaintiffs on that point, and I think there is force in the reasons given by the learned Judge for not accepting that evidence, particularly as this express contract has not been pleaded and has not been referred to in the correspondence. I am not prepared to differ from the learned Judge on his finding of fact that no such express contract was made. Then it is said that after the options became exercisable the defendant agreed with a servant of the plaintiffs at Akola and subsequently with the plaintiffs' agents in Bombay to sign these contracts. Again the plaintiffs' servant gave evidence as to these agreements, and there was no relevant cross-examination on that point. But again the learned Judge was not prepared to accept the evidence. He thought that if there was any agreement by the defendant to sign the contracts, it was conditional on the transaction being carried over by way of badlas to the next vaida. I am again not disposed to differ from the learned Judge on that question of fact, and therefore I agree with him that no express agreement on the part of the defendant to sign the appropriate contracts was ever made.

The question then remains whether there was an implied contract. On that point the learned Judge did not hold that there was no implied contract, but he took the view that an implied contract would not bring the case within bye-law 82, and that there must be an express agreement. Now I am unable to accept that view of the learned Judge. The bye-law does not in terms require an express contract, and I see no reason why an implied contract should not suffice. The question is whether there was any such implied contract. It seems to me that we must presume that when parties enter into a business transaction such as teji mandi contracts, they in-

tend to enter into an arrangement which will be enforceable. These parties must have intended that the necessary contract to take or give delivery would be executed, otherwise the transaction would have been merely a wagering transaction and void, and the cases show that the presumption is that a teji mandi transaction is not a mere wagering transaction. I think therefore we must hold that the parties impliedly agreed that the necessary contracts should be signed. As the transaction here was in cotton, I think we must further hold that the implied agreement was to sign contracts in the form required by the bye-laws; otherwise again the transaction would be unenforceable. That, I think, is the natural inference to draw from the wording of the teji mandi and mandi contracts, but that inference is strengthened by the fact that there had been past dealings between the parties including teji mandi transactions and the defendant always had signed the requisite contracts.

That, I think, confirms our view that there was an implied agreement at the time the contracts in suit were entered into that the requisite contracts in the requisite form should be signed. Mr. Kemp for the respondent has argued that if we take the view that an implied agreement is enough for the purpose of bye-law 82, the bye-law becomes a farce. I rather agree, but then I am disposed to think that the bye-law is really a farce directly you provide that the agreement to sign the contract may be verbal. There seems to me to be little sense in having a bye-law which requires a written contract in a particular form if it goes on to provide that a verbal agreement to execute such a contract will do instead. It is, I think, plain that a verbal contract is sufficient under the latter part of bye-law 82, since there is no provision that the contract is to be in writing. As a matter of fact in the previous corresponding bye-law the words "in writing" were inserted, and presumably they were omitted advisedly from the new bye-law. If a verbal contract is all that is necessary, I see no reason why there should not be an implied contract, and, in my opinion, the facts show that there was an implied contract. On that ground, I think the appeal must be allowed with costs.

There will be a decree for the plaintiffs for the amount claimed with interest thereon at the rate of seven and half per cent from 28th February 1931; costs and interest on judgment at six per cent till payment.

V.B./R.K. *Appeal allowed.*

A. I. R. 1933 Bombay 350

BEAUMONT, C. J. AND MURPHY, J.

Secy. of State—Appellant.

v.

Bai Somi—Respondent.

First Appeal No. 260 of 1931, Decided on 1st February 1933, from decision of Joint First Class Sub-Judge, Ahmedabad.

(a) Civil P. C. (1908), O. 33, R. 10—Pauper succeeding in part only on compromise or otherwise—Charge will be on interest recovered.

Where a plaintiff succeeds in getting something out of the suit either by way of compromise or otherwise, the charge can only be on the interest which the plaintiff recovers in the suit. [P 351 C 1]

(b) Civil P. C. (1908), S. 60 (n)—Order appointing receiver to collect future maintenance is order for attachment—Civil P. C. (1908), O. 33, R. 10.

An order appointing a receiver to collect future maintenance and pay the amount, or the part of the amount, over to the judgment-creditor is an order for attachment and as such illegal: *A I R* 1926 *Mad* 565 and *AIR* 1925 *P C* 176, *Dist*; *Lucas* v. *Harris*, (1886) 18 *Q B D* 127; and *Crowe* v. *Price*, (1889) 22 *Q B D* 429, *Foll.* [P 351 C 2]

(c) Civil P. C. (1908), O. 33, R. 10—Pauper allowed to sue as such to recover possession — Claim compromised, Pauper agreeing to take maintenance to form charge on property claimed—Government seeking to recover court-fees by appointment of receiver of maintenance—Court refused to do so.

The plaintiff, in the suit for possession of a certain house obtained leave to sue as a pauper. The suit was compromised on the terms that the plaintiff should receive a sum of Rs. 96 a year for maintenance, recoverable out of the house in suit. The Government Pleader then sought to recover the court-fees due, on the plaintiff's success under O. 33, R. 10 by appointing a receiver of the plaintiff's maintenance:

Held: that the Court had no jurisdiction to reach the future maintenance which was exempt from attachment, by appointment of a receiver by way of equitable execution.

Held further: that even if the Court had jurisdiction to appoint a receiver Court would not do so having regard to small amount of maintenance. [P 352 C 1, 2]

B. G. Rao—for Appellant.

I. B. Desai—for Respondent.

Beaumont, C. J.—This is an appeal by the Secretary of State for India in Council against an order of the First Class Subordinate Judge at Ahmedabad dismissing the appellant's darkhast proceedings. It appears that the plaintiff in the suit obtained leave to sue as a pauper. In the suit she was claiming possession of a certain house. The suit was compromised on the terms that the plaintiff should receive a sum of Rs. 96 a year for maintenance, such maintenance to be recoverable out of the house in suit.

The present appellant has now applied in darkhast proceedings to attach the house out of which the maintenance is recoverable, and he seeks to do so under O. 33, R. 10. That rule provides:

"Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit."

That rule, in terms, applies where the plaintiff succeeds in the suit. But I will assume that it also applies to a case which the plaintiff, by way of compromise, succeeds in getting something out of the suit. But, in that case, I think, the charge can only be on the interest which the plaintiff recovers in the suit, and here what the plaintiff has recovered in the suit is a right to maintenance and not the house.

Mr. Rao, for the appellant, has contended that, if that is so, we ought to make an order appointing a receiver of the plaintiff's maintenance and direct the receiver to pay, out of the sums received by him, the amount due to Government and in support of his contention he relies on a decision of the Madras High Court in *Secy. of State* v. *Venkata Lakshmamma* (1). That decision purported to follow a decision of the Privy Council in *Rajindra Narain Singh* v. *Sundara Bibi* (2), in which the plaintiff was seeking to enforce a money decree. The head-note reads:

"*Held*: the appellant's interest in the villages was 'a right to future maintenance' within S. 60, sub-S. (1) (n), Civil P. C., 1908, and therefore could not be attached and sold; but that a receiver should be appointed to realize the rents and profits, with direction to pay thereout a sufficient and adequate sum for the maintenance of the appellant and his family, and to apply the balance (if any) to the liquidation of the decree."

Now, under S. 60 (n), Civil P. C., a right to future maintenance is not liable to attachment or sale, and it would certainly seem that an order appointing a receiver to collect future maintenance and pay the amount, or part of the amount, over to the judgment-creditor is an order for attachment. Many payments, in addition to future maintenance, are exempted from attachment under S. 60, and such exemptions would appear to be based on considerations of public policy. If these exempted payments can be reached in execution by the appointment of a receiver by way of equitable execution, the protection afforded by the section is to a great extent lost. I doubt whether the head-note in *Rajindra Narain Singh* v. *Sundara Bibi* (2) is justified by the decision of the Board. It was a moot point in that case whether the property sought to be attached in execution of the decree was future maintenance or not. The learned trial Judge held that the property was a right to future maintenanee within S. 60 (n), Civil P. C., 1908, and therefore not liable to attachment. On appeal, the High Court held that the property was not covered by the expression "a right to future maintenance," and could be seized in execution and that the appropriate form of execution was by the appointment of a receiver. The Privy Council commenced their judgment (delivered according to the report on the same day as the argument) by saying:

"The Board is of opinion that the conclusion reached by the High Court by their judgment of 2nd May 1921 was correct."

And later on, in their judgment, they set out a passage from the judgment of the High Court in these terms, p. 388 (of 47 *All.*):

"The appropriate remedy is what is known as equitable execution or indirect execution, namely by the appointment of a receiver who takes the place of the debtor and acts as an officer subject to the directions of the execution Court in collecting and disbursing the debtor's income in accordance with the directions of the execution Court towards the discharge of the claim of the decree-holder."

And then the Board says p. 388 (of 47 *All*):

"These views appear to the Board to be sound."

1. A I R 1926 Mad 565=94 I C 254=49 Mad 567.
2. A I R 1925 P C 176=87 I C 295=52 I A 262=47 All 385 (P C).

But those views were all based on the finding of the High Court that the property in question was not future maintenance and therefore was not made unattachable by S. 60, Civil P. C.

There are no doubt passages in the judgment of the Board which suggest that the Privy Council considered that the property was future maintenance, that it was not attachable in law, but that it could be reached by the appointment of a receiver by way of equitable execution. But there are no findings in this sense clearly expressed, and agreement with the conclusion of the High Court is clearly expressed. So far as I know the Courts in England have always refused to sanction any form of equitable execution over property not liable to attachment at law: see *Lucas* v. *Harris* (3) and *Crowe* v. *Price* (4). The Privy Council connot, I think, have intended to hold that the appointment of a receiver by way of equitable execution is not attachment within S. 60 (1), Civil P. C., 1908, in a judgment in which the question is not discussed. There may perhaps be a distinction between a case like *Rajindra Narain Singh* v. *Sundara Bibi* (2) in which the applicant was seeking to enforce a money decree, and a case, such as this, arising under O. 33, R. 10, in which the Crown is claiming to enforce a charge having priority to the right of maintenance sought to be attached. But even if we have jurisdiction to appoint a receiver in this case, I think we ought not to do so, having regard to the small amount of maintenance which is only Rs. 8 per mensem.

The appeal therefore must be dismissed with costs.

Murphy, J.—I think that on the record before us the learned Subordinate Judge's order is correct in fact, though not for the reasons he gives. His view was that the house sought to be attached, because the plaintiff's maintenance is charged on it, was not the subject-matter of the decree under O. 33, R. 10.

The real point in the application is whether in view of S. 60, Civil P. C., the maintenance in question can be attached at all. The facts were that plaintiff who sued for possession of a house was allowed to do so as a pauper. She compromised with the then defendant, the terms being that she should receive maintenance at the rate of Rs. 8 per month, such maintenance to be a charge on the house, the subject-matter of the suit. The Government Pleader then sought to recover the court-fees due on the plaintiff's success, and the application was dismissed for the reasons stated. In appeal a different complexion has been put on the matter by the argument that though direct execution cannot be levied on a claim for maintenance, this can be done indirectly, by appointing a receiver of the maintenance and directing him to make the payment asked for. The argument is based on two decisions, one being *Secy. of State* v. *Venkata Lakshmamma* (1), and the second, *Rajindra Narain Singh* v. *Sundara Bibi* (2). The first of these cases follows the second, which is a Privy Council decision, and which decides that the difficulty of enforcing a claim against a right to maintenance can be avoided in the manner now suggested to us.

In the Madras case the maintenance sought to be attached was similar in character to the maintenance here. But in the Privy Council case it was not widow's maintenance, but a payment agreed on by a compromise to be paid out of the income of certain property.

We have not got the High Court's judgment in that case, but from the report it appears that whether the allowance then in question was maintenance or not was a point taken in the appeal, and, as far as we can judge, was decided in the negative. The High Court however did not appoint a receiver, and it was held by the Privy Council that this should have been done. I think that what their Lordships were dealing with had been held not to be a right to future maintenance, though there are passages in the judgment and head-note which suggest a contrary conclusion, but if we are wrong, I agree that in this case we should not appoint a receiver, because no application for one has been made, or even an amendment to that effect sought.

V.B./R.K. *Appeal dismissed.*

3. (1886) 18 Q B D 127=56 L J Q B 15=51 J P 261=35 W R 112=55 L T 658.
4. (1889) 22 Q B D 429=58 L J Q B 215=53 J P 389=37 W R 424.

A. I. R. 1933 Bombay 353

RANGNEKAR, J.

Bandra Municipality—Plaintiff—Appellant.

v.

Vanechand Punamchand—Defendant—Respondent.

Second Appeal No. 255 of 1930, Decided on 19th January 1933, from decision of Asstt. Judge, Thana, in Appeal No. 275 of 1928.

(a) Bombay Municipal Boroughs Act (18 of 1925), Ss. 73 (7) and 112—Special sanitary cess imposed under S. 73 (7) cannot form charge on property concerned.

Under the Bombay Municipal Boroughs Act and the rules made thereunder by the Bandra Municipality, the Municipality is not entitled to a charge on the property in respect of the special sanitary tax imposed under S. 73 (7). [P 354 C 2]

(b) Bombay Municipal Boroughs Act (18 of 1925). Ss. 78 to 89—"Rate on buildings or lands"—Meaning explained.

It is house tax as such which is mentioned and referred to in Ss. 78 to 89 as a "rate on buildings or lands." [P 354 C 1]

S. R. Parulekar—for Appellant.

Y. V. Dixit—for Respondent.

Judgment. — This appeal arises out of a suit brought by the Bandra Municipality to recover the amount of house tax, water-tax, and sanitary cess from the defendant either personally or from his property. The Municipality claimed a first charge on the property for the payment of these taxes. The claim was resisted by the defendant both on facts and on law. The trial Court found that the defendant was not liable personally to pay the taxes, but as the defendant had purchased the property and had become the owner of it in November 1927, the plaintiff Municipality was entitled to a charge on the property in respect of the same. The defendant appealed to the District Court. In appeal the defendant did not resist the claim as regards the house-tax, but contended that the arrears for the sanitary cess and water-tax, could not be a charge on the property. The Municipality curiously enough did not file cross-objections to the decree disallowing the claim personally against the defendant. The learned District Judge upheld the contention of the defendant and allowed the appeal. The result was that the claim of the Municipality to recover the sanitary cess and water-tax personally from the defendant was disallowed by the trial Court, and their claim to a charge in respect of these taxes, allowed by the trial Court, was disallowed by the appellate Court. Hence this appeal.

The appeal has been exhaustively argued by Mr. Parulekar on behalf of the Municipality, and he stated that if he was not able to satisfy the Court that the view taken by the lower Court with regard to the sanitary cess was wrong, he would not take up the Court's time in arguing the question of water-tax, as he felt that S. 112, Bombay Municipal Boroughs Act, might not in terms apply to it, and he has confined his argument to the claim in respect of the special sanitary cess. The only question in appeal, therefore, is, whether the Municipality under the Bombay Municipal Boroughs Act 18 of 1925, and the rules made by it under S. 58 of the Act, is entitled to a charge on property in respect of the tax known as special sanitary cess. The other question raised by Mr. Parulekar is that even if the Municipality are not entitled to a charge in this case, they are entitled to a personal decree against the defendant in respect of the amount due for this particular tax. The question thus raised turns upon a proper construction of certain sections of the Bombay Municipal Boroughs Act, 1925, read with the rules made by the Bandra Municipality under the Act. Ch. 7 deals with "Municipal Taxation;" the first section in it is S. 73 under sub-heading (1) "Imposition of Taxes." The section lays down what taxes may be imposed by a Municipality. The word "tax" is defined by S. 3 as meaning various kinds of imports, cesses, charges or taxes. S. 73 shows clearly the distinction between various kinds of levies or cesses or taxes which the Municipality can impose. Thus under S. 73 (i) we have a rate on buildings or lands. Under (ii) there is a tax on certain kinds of vehicles or animals, etc.; under (iii) a toll on other vehicles; under (iv) an octroi on animals, and so on. Then there is a tax on dogs. Then we come to (vii) which provides for a special sanitary cess upon private latrines, etc., cleansed by municipal agency, after notice given as required under the section. Then there is a drainage tax, and in (x) there is a special water rate, which may be imposed in the form of rate assessed on buildings or in any other form, and so on. Proviso (b) of

the section shows that no special sanitary cess can be levied until the Municipality has

"issued either severally to the persons to be charged, or generally to the inhabitants of the borough . . . to be charged with such cess, one month's notice of the intention of the Municipality to perform such cleansing and to levy such cess."

Apart from anything else it seems to me to be clear from S. 73 itself that there is a distinction between a special sanitary cess and a rate on buildings and lands, and further that in the case of the latter no liability would accrue and no cess would be allowed until a notice is given to the person to be charged, thus indicating that the liability should be imposed on the person to whom the notice is given. In the same chapter under heading "(2) Assessment of and liability to rates on buildings or lands," there are several sections running from 78 to 89 which show clearly how rates on buildings or lands are to be assessed, and show clearly that it is the house-tax as such which is mentioned and referred to in these sections as a "rate on buildings or lands." Of these S. 85 makes it clear that the tax imposed in the form of a rate on buildings or lands is primarily leviable on the actual occupier of the property upon which the tax is assessed. Then under heading "(4) special provisions relating to certain taxes" in the same chapter provision is made for assessing taxes other than those previously dealt with and for fixing the liability in respect thereof and this matter is dealt with in Ss. 91 and 92 with the exception of octroi and tolls, which are dealt with under sub-heading (5). The next chapter, that is Ch. 8, refers to and deals with "Recovery of Municipal Claims," and it is in that chapter that S. 112 finds a place. It is on this section that Mr. Parulekar relies. It runs thus:

"All sums due on account of any tax imposed in the form of a rate on lands or buildings or both shall, subject to prior payment of land revenue, if any . . . . be a first charge upon the building or land, in respect of which such tax is leviable . . ."

It may be noticed that the language employed in this section in describing the tax which is declared to be a charge is substantially the same as the language in S. 85 which it is clear refers to a house-tax authorised under S. 73 (i).

I now come to the rules entitled "Bandra Municipality Rules 1920," a copy of which is made available to me owing to the courtesy of Mr. Parulekar. At p. 108 there is a heading "Time and Mode of Recovery of Municipal taxes &c." The first rule under that heading is R. 337 which refers to Sch. E. R. 317 says that the Municipality shall levy the taxes and recognise the exemptions specified in Sch. E, which is printed at p. 176 of the Bandra Municipality Rules. In Sch. E there are various columns under various headings, and Col. 3 is in regard to "Class of persons or property liable," and the fourth shows "Amount for which or rate at which classes liable." It is not necessary to refer to these columns. Col. 2 gives the names of taxes, and the first tax described is "house-tax," which, it is clear, corresponds with the first tax in S. 73 (i), and Col. 3 shows that in respect of this tax all houses and buildings including land are liable. Coming to the special sanitary cess the following note appears under Col. 3: "The owner or the occupant at the discretion of the Municipality;" the rest of the note is irrelevant. So that the liability in respect of the house-tax is clearly imposed on the house or building concerned; the liability in respect of the sanitary cess is imposed on the owner or occupant. Mr. Parulekar refers to Col. 4 dealing with the amount which shows that the special sanitary cess is to be assessed in a particular manner, i. e. 4 per cent. of rental value as fixed for house-tax, assessment, &c.; and argues that that shows that it is a tax in the form of a rate on the houses or buildings. I am unable to accept this argument particularly in view of the specific language of the sections and the rules.

This then being the scheme of the Act and the rules, it is difficult to see how a special sanitary cess will come under the words "House rate on buildings" or even within the words "a rate on lands or buildings" occurring in S. 112 of the Act. There is no clear indication anywhere that in the case of this tax property was primarily liable. I think, therefore that the view of the lower appellate Court that the Act does not contemplate placing the burden of the special sanitary cess on the building concerned is correct.

This brings me to the question as to whether Mr. Parulekar is entitled to ask for a personal decree in this appeal. The question arises in this way: The trial Court held that under the Act the defendant was not personally liable in respect of these taxes, but that his property was and that the taxes were a charge upon the same. The defendant appealed from the latter part of the decree. The Municipality filed no cross-objections to that part of the decree by which their claim to a personal decree was disallowed. The appeal Court allowed the appeal. Two questions arise. The first is whether in this second appeal the Municipality can ask for a personal decree. The other is whether under the Act the defendant is personally liable. I do not wish to express any opinion on either of these questions as it seems to me that on facts the Municipality must fail. The case for the Municipality was that the defendant's father was as mortgagee in possession and therefore the owner of the property and he was liable in respect of this tax. The taxes claimed were in respect of the period 1925-26 to January 1928.

Now the burden of proving that the defendant was the mortgagee in possession, and that the possession commenced from 1923 as alleged was on the Municipality. They never asked for an issue on that point in any of the Courts and they never led any evidence on it. All that happened was that this allegation was made in the plaint as to which the defendant stated that he did not know whether his father was a mortgagee in possession in 1923. The plaintiff then put in a purshis calling upon the defendant to produce the mortgage deed. The Municipality did nothing beyond this, and the matter ended there. Apart from that the record is against them. It appears clearly from the documents which have been put in on behalf of the defendant that this property belonged to one Dala and he had mortgaged it to defendant's father. A suit on the mortgage was filed, and in execution of the decree the defendant purchased the property in November 1927. He applied to the Court for being put in possession and the Court made an order giving him possession in November 1927, and in those proceedings the mortgagor made a statement, which is on record, that he was in receipt of rent up to November 1927 and further expressed his willingness to hand over possession in November 1927. These facts clearly show that the defendant had nothing to do with the property till the end of 1927, and that being so, the claim of the plaintiff against him must fail. In the result, therefore, the appeal must be dismissed with costs.

V.B. *Appeal dismissed.*

A. I. R. 1933 Bombay 355

RANGNEKAR AND BROOMFIELD, JJ.

Pandurang Hanmantrao— Plaintiff—Appellant.

v.

Yesubai Tatyasaheb Salunke — Defendant—Respondent.

Cross First Appeals Nos. 561 of 1927 and 36 of 1928, Decided on 24th January 1933, from decision of First Class Sub-Judge, Satara, in C. S. No. 415 of 1926.

Hindu Law—Adoption—Grandmother succeeding directly to her grandson cannot adopt to her husband.

T, a Hindu, died leaving his widow *Y* and a son. The son died leaving a natural son *S*. *S* then died and the former widow, that is Y, adopted a son to her own husband :

Held : the adoption was invalid : 26 *Bom* 526 (*F B*), *Foll.*; *Case law referred.* [P 356 C 2]

R. P. Karandikar and *V. D. Limaye*—for Appellant.

K. N. Koyajee—for Respondent.

Rangnekar, J.—These are two cross-appeals from a decision of the First Class Subordinate Judge at Satara in a suit brought by the plaintiff for a declaration that defendant 2 was not validly adopted by defendant 1, and for consequential reliefs. The genealogical tree of the family is set out in the print and it appears from it that Appasaheb and Balasaheb were brothers. Appasaheb died leaving a son Tatyasaheb who died about 45 years ago leaving his son Yeshwantrao and a widow Yesubai, who is defendant 1 in the suit. Yeshwantrao died in May 1914, his wife Anusuyabai having predeceased him. Yeshwantrao left a son Shankar who died on 24th May 1914. The plaintiff in the suit is the grandson of Balasaheb, the brother of Appasaheb. The plaintiff's case was that there was no separation in the family, and therefore the adoption of defendant 2 by Yesubai was invalid as it was not consented to by him, he being the only coparcener in the family. Plaintiff fur-

ther contended that Yesubai's power to adopt a son to her husband Tatyasaheb was extinguished in the events which had happened and could not be revived, and on that ground also the adoption of defendant 2 was invalid. Several issues were raised and the question of the validity of the adoption was first considered. The learned Judge held on the evidence that the branch of Balasaheb had separated from that of Appasaheb and therefore no consent of the plaintiff was necessary. He further held that the adoption of a son to Tatyasaheb by Yesubai was invalid on the ground that her power to adopt had come to an end. From this decision both the plaintiff and the defendants appeal.

The plaintiff's appeal is No. 561 of 1927 and the only point in the appeal is that the learned Judge was wrong in holding that Yesubai's husband had separated from the rest of the family. As regards that appeal Mr. Karandikar who appears for the appellant stated at the outset that he accepted the finding of the learned Judge that the parties were separate and that he does not press the appeal. The result therefore is that that appeal would be dismissed. The other appeal by the defendants is No. 36 of 1928, and, as far as I can see, the only question in the appeal is whether on the facts of the case it does not come within the principle laid down by a Full Bench of this Court in *Ramkrishna* v. *Shamrao* (1). It is argued by Mr. Koyajee that the facts in the present case differ from those in the Full Bench case. He further says that the Full Bench decision went beyond the facts in that case and that the test of determining the validity of an adoption under circumstances such as these is whether by such an adoption the widow divests the estate of any person other than her own. Mr. Koyajee also relies on a decision of a Division Bench in *Narhar Govind* v. *Balwant Hari* (2). In *Pratapsing Shivsing* v. *Agarsingji Raisingji* (3) their Lordships of the Privy Council observed that a Hindu widow can exercise a power to adopt which is vested in her so long as the power is not extinguished or exhausted and although her husband's estate is not vested in her. It has been also held by the Privy Council that there is a limit to the period within which a widow can exercise her power of adoption and that once that limit is reached "the power is at an end." The question as to when the power is at an end, or when it becomes extinguished and the limit is reached, arose in *Ramkrishna* v. *Shamrao* (1). The judgment of the Full Bench was delivered by Chandavarkar, J., who, after considering various authorities, observed as follows (p. 532):

> "Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

The learned Judge also observed on the same page as follows :

> "In the view we take of the law as laid down by the Privy Council, viz. that a widow's power of adoption comes to an end and can never be revived after the inheritance has vested in some heir of her son other than the widow herself, it is immaterial whether the estate which she takes when the inheritance comes to her after that vesting is absolute or limited."

We are bound by this decision, and, taking the principle laid down therein and applying it to the facts of this case, the position seems to be as follows: Tatyasaheb, a Hindu, died leaving his widow Yesubai and a son Yeshwantrao. The son Yeshwantrao died leaving a natural son Shankar. Shankar then died and the former widow, that is, Yesubai, adopted a son to her own husband. On these facts it is difficult to see how the present case is not governed by the Full Bench decision. The only distinguishing fact on which Mr. Koyajee relies is that in the Full Bench case the widow of the son died after him, and in the present case Yeshwantrao's wife predeceased him. That, in my opinion, on principle, makes no difference and does not take away the case from the principle laid down by the Full Bench. Mr. Koyajee says that the test is whether the adoption divests the estate vested in any person other than the widow. This argument is answered in *Ramkrishna* v. *Shamrao* (1). In fact the appellant's argument in that case was that a widow can adopt so long as she does not divest the estate which is vested in some person other than herself. Chandavarkar, J., with regard to this argument, says as follows (p. 529) :

1. (1902) 26 Bom 526=4 Bom L R 315 (FB).
2. AIR 1924 Bom 437=80 I C 435=48 Bom 559.
3. AIR 1918 P C 192=50 I C 457=46 I A 97=43 Bom 778 (PC).

"That, according to Mr. Chaubal's contention, is the only condition defining the widow's power to adopt, so that whenever, after the estate has become so vested in that person and subsequently in other persons as his heirs, it comes to the widow herself as his or their heir, her power of adoption to her deceased husband is capable of execution, because in that event she divests no estate but her own. The difficulty of accepting this argument as a correct exposition of the law laid down by the Privy Council in *Bhoobun Moyee* v. *Ram Kishore* (4) and in their two later decisions re-affirming the decision in that case lies both in the language used and the line of reasoning adopted by their Lordships in their judgments in all the three cases."

The learned Judge further observed as follows (p. 529):

"If Mr. Chaubal's contention be correct, a widow can adopt without any limit as to the period within which such adoption may be made and her power is never at an end—it is only suspended so long as the estate is vested in others, but directly it comes to her from those others it is revived. The language in the judgment in *Bhoobun Moyee's* case (4) however is so explicit that it is impossible to construe it otherwise than as meaning that there is a limit to the period within which a widow can exercise her power of adoption, and that once that limit is reached the power 'is at an end.'"

We agree therefore with the Division Bench of this Court which decided *Krishnarao Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (5), that the language of the Privy Council is:

"altogether inconsistent with any idea of the right to adopt being merely suspended during the widow's life."

The Full Bench case was approved by their Lordships in *Madana Mohana* v. *Purushothama* (6). Their Lordships observed as follows (p. 161 of 45 *I. A.*):

"In the present case their Lordships do not consider it necessary to decide whether the document before them can be construed as by its terms enabling a second adoption to be made. For the vital question here is whether after the adoption of Brojo Deo the power still survived in the widow of Adikonda Deo. When and under what circumstances the authority ceases to be exercisable has been considered in a number of cases both by this Board and the Courts in India. The High Court at Bombay took the view that the power must be looked on as extinguished under analogous circumstances in the case of *Ramkrishna* v. *Shamrao* (1), where Chandavarkar, J., delivering the judgment of the Full Bench, examines the authorities closely. He interprets earlier decisions of the Judicial Committee as having established conclusively that, quite apart from any question of construction, there is a limit imposed by law to the period within which a widow can exercise a power of adoption conferred on her, and that when that limit is reached the power is at an end. That limit may arise from circumstances such as those already referred to. The authorities on which he founds are the judgment of this Board as delivered by Lord Kingsdown in *Bhoobun Moyee* v. *Ram Kishore* (4) and the subsequent judgments in *Pudma Coomari Debi* v. *Court of Wards* (7) and *Thayammal* v. *Venkatrama Aiyan* (8).

"Their Lordships are in agreement with the principle laid down in the judgment of the Full Court of Bombay as delivered by the learned Judge, and they are of opinion that, on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on Adikonda's widow to an end when Brojo, the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of a natural-born son or by the adoption to him of a son by his own widow."

Ramkrishna v. *Shamrao* (1) has also been recently approved in *Bhimabai* v. *Gurunathgouda* (9). Sir Dinshah Mulla, who delivered the judgment of the Board, observes as follows (p. 210 of 35 *Bom. L. R.*):

"Another argument for the respondent against the validity of the adoption was that if the adoption of appellant 2 were upheld, the result would be that while a paternal grandmother could not adopt, a grand-aunt could adopt. It is true that Nilkanthagouda having died leaving a son, and that son having himself died leaving a son, Nilkanthagouda's widow could not have adopted a son to her husband. But that is because her power to adopt came to an end the moment Dyamangouda died leaving a son: see *Ramkrishna* v. *Shamrao* (1)."

The Full Bench decision seems to me to cover the facts of the present case and is a complete answer to the argument on behalf of the appellant. That being the position, I do not think it is necessary to go into the judgment in *Bhoobun Moyee* v. *Ram Kishore* (4) itself. In my opinion, as this is the only question in the appeal, the appeal must fail. I think the learned Judge has taken a correct view and I see no reason to interfere. The result would be that Appeal No. 561 will be dismissed with costs. Appeal No. 36 also will be dismissed with costs.

Broomfield, J. — I agree and have nothing to add.

K.S. *Appeals dismissed.*

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4. (1863-66) 10 M I A 279 (PC).
5. (1892) 17 Bom 164.
6. AIR 1918 P C 74=46 I C 481=45 I A 156=41 Mad 855 (PC).
7. (1881) 8 Cal 302=8 I A 229=4 Sar 285 (PC).
8. (1887) 10 Mad 205=14 I A 67=5 Sar 10 (PC).
9. AIR 1933 P C 1=141 I C 9=60 I A 25=57 Bom 157=35 Bom L R 200 (PC).

*** A. I. R. 1933 Bombay 358**

BAKER AND BARLEE, JJ.

Annacharya Sitaramacharya—Appellant.

v.

Narayan Pandurang—Respondent.

First Appeal No. 229 of 1931, Decided on 10th March 1933, from decision of First Class Sub-Judge, Bijapur, in Misc. No. 7 of 1931.

(a) Civil P. C. (1908), O. 23, R. 2—Property put up for sale in execution of decree —Arrangement between decree-holder and judgment-debtor before confirmation of sale giving latter time for payment—Sale to be confirmed on default of payment—Darkhast allowed to be withdrawn—Default of judgment-debtor—Fresh darkhast is not necessary.

The plaintiff obtained a decree against the defendants and in execution of that decree certain property was attached and put up for sale. Before the sale was confirmed the judgment-creditor and the judgment-debtors came to an arrangement and they made a joint application to the Court by which they asked that defendant having agreed to pay the whole of the decretal amount together with interest and costs on or before a certain date, the confirmation of the Court sale should be held over until such date in case the defendants paid up that day. If the defendants did not pay, the sale should be confirmed without further delay. After setting out the terms agreed between the parties the order of the Court was as follows:

"On that understanding the darkhast is allowed to be withdrawn by the plaintiff decree-holder. If defendant fails to pay up money as provided plaintiff to be at liberty to apply for confirmation of the sale in pursuance of the compromise understanding, and the Court will see to the order of the kind being passed later. For the present the darkhast is allowed to be withdrawn."

The defendant committed default and plaintiff applied for confirmation of sale in pursuance of the original order:

Held: that no fresh darkhast was necessary and that he was entitled to have the sale confirmed: *Case law referred*. [P 359 C 2]

*** (b) Civil P. C. (1908), O. 22, R. 3—Death of decree-holder pending execution—Legal representative can be substituted in his place and allowed to continue execution.**

The legal representative of deceased decree-holder who dies during the pendency of an execution petition filed by him can be subsituted in his place in the execution petition and be allowed to continue it: *A I R* 1932 *Mad* 73 (*F B*), *Foll.*; 50 *Mad* 1; 99 *I C* 627 and *A I R* 1927 *Mad* 184, *Held* **Overruled.** [P 360 C 2]

(c) Interpretation of Statutes—Choice between two interpretations of rule of procedure — More beneficial one should be adopted.

When there is a choice between two interpretations of a rule of procedure the more beneficial interpretation must be adopted, especially when the adoption of the other might lead in many cases to great injustice. [P 361 C 2]

R. A. Jahagirdar—for Appellant.

A. G. Desai—for Respondent 1.

Baker, J.—This appeal involves two questions of law one of which is of some importance. The plaintiff obtained a decree against the defendants and in execution of that decree certain property was attached and put up for sale. Before the sale was confirmed the judgment-creditor and the judgment-debtors came to an arrangement and they made a joint application to the Court by which they asked that defendant 1 having agreed to pay the whole of the decretal amount together with interest and costs on or before 29th December 1930, the confirmation of the Court sale, which took place on 4th July 1929, should be held over until 29th December 1930, in case the defendants paid up that day. If the defendants did not pay the sale should be confirmed without further delay. The learned Subordinate Judge on this passed an order, dated 20th February 1930, which is set out in the judgment of the lower Court. The order is as follows:

"Parties say that they have come to a compromise understanding in respect of the claim in the darkhast. In pursuance of that understanding plaintiff chooses not to press for the further continuance of the darkhast. It is said that defendant has agreed to pay up the amount due within one year failing which the sale already made has to be confirmed without demur. On that understanding the darkhast is allowed to be withdrawn by the plaintiff decree-holder. If defendant fails to pay up money as provided, plaintiff to be at liberty to apply for confirmation of the sale in pursuance of the compromise understanding, and the Court will see to the order of the kind being passed later. For the present the darkhast is allowed to be withdrawn."

The judgment-debtor did not pay and therefore the decree-holder applied to the Court asking the Court to take action conformably to the order passed on 20th February 1930, and for confirmation of the sale. The opponents contended that the darkhast having already been withdrawn the only remedy of the judgment-creditor was to present a fresh darkhast. But that contention was overruled by the lower Court on the authority of certain cases which have been quoted and the application was allowed. The order was: "Darkhast No. 535 of 1927 to be sent to the Collector for further action." The judgment-debtor has appealed.

It has been contended that this application by the parties does not amount to an adjustment, that it has not been recorded, and that the only order which the Court had passed is for the withdrawal of the darkhast. There is therefore no darkhast which can be proceeded with, and the only remedy of the judgment-creditor is to present a fresh darkhast. Now if the application made by the parties and the order be read, it will be seen that the parties had arrived at an adjustment by which time was given to the judgment-debtor to pay, and if he did not pay, the sale which already had taken place was to be confirmed without hearing any objection on his part. O. 23, R. 4, Civil P. C., does not apply to execution proceedings, but I see no reason why this should not be regarded as an adjustment under O. 23, R. 2, and as no form is provided in which an adjustment should be recorded, the order which has been passed by the Court on the application made by the parties would be a sufficient compliance with the law. Unfortunately the order is not so well expressed as it might be. If it is read as a whole, it is quite clear that what the learned Subordinate Judge meant was that the whole darkhast should stand over until the payment was made by the judgment-debtor. After setting out the terms agreed between the parties the order goes on to say:

"On that understanding the darkhast is allowed to be withdrawn by the plaintiff decree-holder. If defendant fails to pay up money as provided, plaintiff to be at liberty to apply for confirmation of the sale in pursuance of the compromise understanding, and the Court will see to the order of the kind being passed later. For the present the darkhast is allowed to be withdrawn."

Now a darkhast cannot be withdrawn "for the present." It must be either withdrawn altogether or not at all. Obviously what the learned Subordinate Judge meant was that the proceedings in the darkhast should be stayed and the matter kept in abeyance until the expiry of the period agreed upon between the parties, and it is clear that it was not contemplated that further proceedings had to be taken by instituting a fresh darkhast. All that was necessary was that in the event of the terms agreed upon between the parties not being fulfilled by the judgment-debtor, the order of confirmation of the sale should follow immediately on the application by the decree-holder. It has been argued by the learned advocate for the appellant that he would have no case if the learned Subordinate Judge had said that the sale would be confirmed unless the judgment-debtor pays within the date mentioned in the application. There can be no doubt as to what the intention of the Subordinate Judge was, and because he has not expressed himself so accurately as he might have done, that is no ground for holding that the darkhast in which this application was made had ceased to exist and ordering the decree-holder to file a fresh darkhast. The cases which have been quoted by the learned Subordinate Judge: *Venkatrav Bapu* v. *Bijesing Vithalsing* (1), *Chintaman Damodar* v. *Balshastri* (2), *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (3), *Qammaruddin Ahmad* v. *Jawahir Lal* (4) and *Mujibullah* v. *Umed Bibi* (5) are not precisely similar in their circumstances. But they show that a fresh application is not necessary under all the circumstances: *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (3), which is a Privy Council case, lays down that

"where a sale of attached property is stayed by a Court upon the application of the judgment-debtor, on condition of the attachment remaining in force, the subsequent striking off of such application from the file of the Court does not affect the rights of the decree-holder."

That was a case in which the darkhast had been struck off and obviously the intention of the learned Subordinate Judge who passed the order in the present case was to keep the darkhast in abeyance and to resume the proceedings from the point where they had been left off if the judgment-debtor failed to pay. So far as the first point is concerned therefore I have no doubt that the view of the lower Court is correct.

A second point however has arisen since the filing of this appeal which has been argued at some length and is of considerable importance. It may be said that this point does not strictly arise on the judgment of the lower Court, but in the circumstances it is necessary

1. (1885) 10 Bom 108.
2. (1891) 16 Bom 294.
3. (1881) 8 Cal 51=8 I A 123=4 Sar 218 (P C).
4. (1905) 27 All 334=32 I A 102=8 Sar 810 (P C).
5. (1908) 30 All 499.

for us to deal with it. The decree-holder died during the pendency of the appeal proceedings and although we are not in a position to know what has been done by his heirs and as the papers are here very probably nothing has been done, it will be necessary for the heir or the legal representative of the decree-holder to proceed in the matter. The point taken is that as O. 22, R. 3, Civil P. C., does not apply to execution proceedings it is not open to the heirs of the deceased decree-holder to have their names substituted for his and continue the execution proceedings against the judgment-debtors. This is the view which has been expressed by Sir Dinshah Mulla in Edn. 9 of his Civil P. C., in the note on O. 22, R. 12 and that view is founded upon the decision of the Madras High Court in *Palaniappa Chettiar* v. *Valliamai Achi* (6) and of the Allahabad High Court in *Baijnath* v. *Ram Bharos* (7). So far as the Allahabad High Court is concerned all that the judgment says is that there is no rule of law which enables a legal representative of the deceased decree-holder to apply for mere substitution of names and that he must apply, whenever he does apply, for execution of the decree under 21, R. 16, Civil P. C. But at the same time the Court held that neither the application sent by the deceased judgment-creditor dated 28th January 1925, nor the application dated 28th April 1925, by his sons that they might be brought on the record was a "fresh application" within the meaning of S. 48, Civil P. C. *Palaniappa* v. *Valliamai Achi* (6) lays down that the legal representative of a decree-holder, who died during the pendency of an execution petition filed by him, cannot be substituted in his place in the execution petition and be allowed to continue it. The question must be decided by reference to the specific terms of the Code of Civil Procedure and not on the general principle. It is hardly necessary to point out that the effect of this interpretation is to penalise the heirs of the deceased judgment-creditor for what is not their fault. Some of the cases which have been quoted are cases in which the fresh application under O. 21, R. 16, Civil P. C., was likely to be barred by limitation. In a case like the present where execution proceedings have lasted a long time and had practically reached their termination it would be a great hardship if they had to be commenced de novo by a fresh application and if the heir of the deceased judgment-creditor could not apply to be placed on the record to continue the proceedings from the point where they stood at the death of the judgment-creditor.

The matter however has been reconsidered by a Full Bench of the Madras High Court in a recent case of *Venkatachalam Chetti* v. *Ramaswamy Servai* (8). The whole of the case-law there has been reviewed exhaustively and it has been held that the legal representative of a deceased decree-holder who died during the pendency of an execution petition filed by him could be substituted in his place in the execution petition and be allowed to continue it, and the case of *Palaniappa Chettiar* v. *Valliamai Achi* (6) has been overruled. It would appear that the general principle in this Court has been to allow the heir of the deceased judgment-creditor or the judgment-debtor to be brought on the record. There is no ruling of this Court since the introduction of the new Civil Procedure Code. The latest case on the point is *Purushottam* v. *Rajbai* (9), which is under the old Code, and it has been argued by the learned advocate for the appellant that the introduction of R. 12, O. 22, appearing for the first time in the new Code renders those Bombay decisions no longer valid. However that may be, it is not necessary for me to repeat the arguments, which have been set out at very great length in *Venkatachalam Chetti* v. *Ramaswamy Servai* (8). But I may say with respect that I agree with the view which has been taken by the Full Bench that the legal representative of a deceased decree-holder who died during the pendency of an execution petition could be substituted in his place and be allowed to continue the proceedings. Therefore it would be open to the representative of the deceased decree-holder in this

6. A. I. R. 1927 Mad 184=99 I C 627=50 Mad 1.
7. A I R 1927 All 165=104 I C 116=49 All 509 (F B).
8. A I R 1932 Mad 73=135 I C 561=55 Mad 352 (F B).
9. (1909) 34 Bom 142=4 I C 839.

case to continue the proceedings from the point where they terminated at the date of agreement between the deceased judgment-creditor and the deceased judgment-debtor. The form of the order made by the lower Court is not so well expressed as it might be. But there can be no doubt as to what the intention of the Court was regarding the case. There is no reason why the proceedings should commence de novo instead of going on from the point at which they were suspended by virtue of the arrangement between the parties. The decree of the lower Court will therefore be confirmed and the appeal dismissed with costs.

Barlee, J.—I agree on both points. The plaintiff obtained a decree against the defendant and in execution had his house put for sale and the sale was actually effected. The defendant then objected to it under O. 21, R. 90. The parties came to terms and it was agreed between them that the plaintiff should give the defendant time to pay the debt and that the defendant should give up his objection to the validity of the sale. This agreement was embodied in a joint application to the Court and the proceedings for the time came to an end. The defendant failed to carry out the agreement, the plaintiff was then at liberty to apply for confirmation of the sale and the defendant was not at liberty to raise any objection to the validity of the sale. The only difficulty arises out of the inartistic wording of the final order of the learned Subordinate Judge. He has written "for the present the darkhast is allowed to be withdrawn." What he must have meant was that the execution of the darkhast was postponed. The objection made by the defendant that the darkhast having been withdrawn cannot be re-opened has therefore no force.

A second question arises owing to the death of the judgment-creditor (plaintiff) after the decision of the learned Subordinate Judge. It is argued on behalf of the judgment-debtor (defendant) that his legal representative cannot now be brought on the record and that the only course open to him is to file a fresh darkhast. That is the view taken by the Madras High Court in the case of *Palaniappa Chettiar* v. *Valliamai Achi* (6). But a contrary and a more liberal view has been taken by a Full Bench of the same Court in *Venkatachalam Chetti* v. *Ramaswamy Servai* (8). I agree with my learned brother that when there is a choice between two interpretations of a rule of procedure the more beneficial interpretation must be adopted, especially when the adoption of the other might lead in many cases to great injustice. Of course were there definite prohibition in the Code the question of justice or injustice would be irrelevant. But there is no definite prohibition. It is merely a question of interpretation, and we are therefore justified in adopting the Full Bench decision of the Madras High Court in *Venkatachalam Chetti* v. *Ramaswamy Servai* (8).

K.S.

Appeal dismissed.

A. I. R. 1933 Bombay 361

RANGNEKAR AND BROOMFIELD, JJ.

Asstt. Development Officer, Trombay—Appellant.

v.

Tayaballi Allibhoy Bohori—Respondent.

First Appeal No. 287 of 1927, Decided on 15th February 1933, from decision of Asstt. Judge, Thana, in Ref. No. 82 of 1924.

(a) Land Acquisition Act (1894), S. 23—Determination of market value—Post notification sales should not be ignored altogether.

In determining the market value of land to be acquired by Government post-notification transactions should not necessarily be ignored altogether. All transactions must be relevant which can fairly be said to afford a fair criterion of the value of the property as at the date of the notification. If any considerable interval has elapsed the Court will naturally attach little or no value to subsequent sales, just as transactions long prior to the notification will usually be discarded. [P 363 C 2]

(b) Land Acquisition Act (1894), S. 12—Acquiring officer's award is only offer—Onus of proving inadequacy of award is on person who claims enhanced compensation.

The acquiring officer's award is, of course, strictly speaking not an award at all, but an offer. It is based on inquiry and inspection and the officer responsible for it is usually a man of experience and local knowledge. He may take evidence but he is not bound to do so, and his proceedings are administrative rather than judicial. But if his award is not accepted and the matter is taken into Court, the proceedings are thenceforward judicial in character. The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand, and if he succeeds in showing prima facie that the

award is inadequate, then Government must support the award by producing evidence. [P 364 C 1]

(c) Land Acquisition Act (1894), S. 23—Court should take broad view based on evidence and favourable to owner in estimating value.

The valuation of immovable property is not an exact science. The Court is bound to treat the matter judicially as far as possible and it should only guess when science or common sense will not point to a definite conclusion. The Judge ought to be liberal in the sense that he should not be too meticulous or pedantic in dealing with the evidence. The value of property should not be unduly depreciated in order that Government may acquire as cheaply as possible, and seeing that an exact calculation to annas and pies is usually impossible, the Court is justified in taking a broad view as favourable to the owner as the evidence permits. But, as in the case of any other judicial proceedings, the findings must be based upon evidence and legitimate deductions from it, and if there is an appeal, both the evidence and the deductions are subject to reconsideration by the appeal Court: *A. I. R.* 1922 *Bom.* 399 and 26 *Bom.* 1 (*P. C.*), *Ref.* [P 364 C 1]

Jamshed Kanga and *P. B. Shingne*—for Appellant.

H. C. Coyajee and *W. B. Pradhan*—for Respondent.

Broomfield, J.—These are connected appeals from the judgment of the Assistant Judge of Thana in 19 references under the Land Acquisition Act arising out of the compulsory acquisition of lands in Kurla. The lands were notified for acquisition under various notifications between 17th January 1922, and 12th January 1923. But the bulk of them, more than 18 acres, were included in the notifications of 17th and 19th January 1922, those subsequently notified being only about 1½ acres. The acquisition was carried out by Government as part of a scheme for the development of the Bombay suburban area, the special object in this case being the construction of a light railway linking up Kurla with Andheri. There has been some discussion as to whether Kurla should properly be described as an industrial suburb or a slum area, but nothing much seems to turn on this. It appears that it is not or was not at the material time a very attractive or sanitary place of residence, but it was undoubtedly a residential and not an agricultural area, and it is conceded that the particular lands with which we are concerned must be valued as possible building sites, not by the acre, but at so much per square yard. As regards communications, the main artery of traffic in Kurla is the Old Agra Road, and one main group of lands adjoins this road. Another main group lies between this road and the New Agra Road on the north-west. On the opposite side of the Old Agra Road, that is on the south-east, there is a road called the Pipe Road leading up to the Vihar pipe line. The rest of the lands lie between these limits, that is between the Old Agra Road and the pipe line, and at the southern-most point they approach the Station Road which leads from the Station and the Pipe Road to the Old Agra Road.

There were altogether 23 references to the Court, but in four there has been no appeal. Out of the 19 appeals 18 are by Government for reduction of the amount awarded by the Assistant Judge as compensation. The remaining appeal is by the owner of the lands for enhanced compensation. Before dealing with the appeals individually, there are some general questions which it will be convenient to consider first. The method of valuation which has been adopted is in the main the market price as deducible from actual sales of the acquired lands and neighbouring lands. The original awards, the arguments of the claimants in the references, the judgment of the Assistant Judge and the arguments in these appeals in this Court, are all founded on these statistics which should be applied of course with reference to the physical characteristics of the particular lands, and it is conceded that this method of valuation is the correct one in this particular case. Stated generally then, the question in all these appeals is whether the Assistant Judge has drawn proper deductions from the facts and figures before him and applied them fairly to the circumstances of each case. It is, therefore, necessary to consider in the first place to what extent the evidence on which the valuation is to be based is affected by the boom in land values in Bombay and the suburbs which, according to the generally accepted view: see *Government of Bombay* v. *Merwan* (1) and other cases cited by the learned Advocate-General, reached its height in 1920 and was followed by a more or less rapid slump at the end of that year or the beginning of 1921. It has been contended by the claimants,

1. A I R 1924 Bom 161=82 I C 796=48 Bom 190.

and the Assistant Judge has accepted their contention, that Kurla was an exception and that prices there did not show any downward trend until long after the notifications in this case were published at the beginning of 1922. Prima facie the statistics appear to support this view.

We have been supplied with a statement in which all the instances of sales relied on by Government and the claimants are collected together. There are 65 instances in all between the years 1918 and 1923 and it will be useful to take a general survey of them. (After so doing, the judgment proceeded.) But in connexion with the figures for 1922 and 1923 there is the obvious difficulty that these transactions are subsequent to the notifications in January 1922. The public notification of a scheme for the development of Kurla and the increase of its amenities by the construction of a railway connecting it with Andheri might very probably counteract any tenancy to a slump in land values. The learned Advocate-General, therefore, has argued that all post-notification sales should be disregarded altogether. He has relied on certain decisions of this Court, e. g., First Appeal No. 162 of 1925 and First Appeal No. 365 of 1925. We were also referred to *Government of Bombay* v. *Karim Tar Mahomed* (2), where Macleod, J., observed, in the course of his judgment, that sales after the date of notification must be discarded when it is proved that values have been affected one way or the other by circumstances which have arisen after that date. My learned brother has also drawn my attention to the observations of Fletcher Moulton, L. J., in *In re Lucas and Chesterfield Gas and Water Board* (3) (p. 29):

"The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i. e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory owners. The power is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him."

I may mention also S. 24, Land Acquisition Act, in which it is provided that the Court shall not take into consideration inter alia any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired; or any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put. Nevertheless I doubt if anything can be found in these authorities which would justify the conclusion that post-notification transactions must necessarily be ignored altogether. All transactions must be relevant which can fairly be said to afford a fair criterion of the value of the property as at the date of the notification. If any considerable interval has elapsed the Court will naturally attach little or no value to subsequent sales, just as transactions long prior to the notification will usually be discarded. The learned counsel who appeared for the respondents in most of these appeals has conceded that the transactions in 1923 are not valuable as evidence. But transactions only a month or two after the notification may sometimes perhaps have some value as evidence. It must largely depend on the purpose of the acquisition. If lands have been acquired, as in the present case, for the development of a locality and the improvement of its communications and amenities, it is a reasonable inference that the value of property will increase, and the Court, I think, must consider that factor, even though it is not directly proved that the transactions in question have been affected by the notification. Direct proof would hardly ever be available. I would therefore not exclude sales in 1922 entirely from consideration, but I would treat them as evidence of rather doubtful value.

Then, in view of certain arguments which have been addressed to us, I shall make a few observations as to the burden of proof and the functions of the Court in land acquisition references. The acquiring officer's award is of course

2. (1909) 33 Bom 325=3 I C 273.
3. (1909) 1 K B 16=99 L T 767=72 J P 437=6 L G R 1106=24 T L R 858=77 L J K B 1009.

strictly speaking not an award at all but an offer. It is based on inquiry and inspection and the officer responsible for it is usually a man of experience and local knowledge. He may take evidence, but he is not bound to do so, and his proceedings are administrative rather than judicial. But if his award is not accepted and the matter is taken into Court, the proceedings are thenceforward judicial in character. The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand, and if he succeeds in showing prima facie that the award is in adequate, then Government must support the award by producing evidence. It is no doubt true that the valuation of immovable property is not an exact science. As Macleod, C. J., said in his judgment in *Frenchman* v. *The Assistant Collector, Haveli* (4), (p. 786 *of* 24 *Bom. L. R.*):

". . . the very best efforts of an expert or a Court to fix a market value for a property like this can never amount to much more than a quasi scientific guess, which the Court should in the case of compulsory acquisition temper with liberality."

But I can call in aid the general tenor of the judgments of that learned Judge in land acquisition cases to support me when I say that the Court is bound to treat the matter judicially as far as possible and it should only guess when science or common sense will not point to a definite conclusion. The Judge ought to be liberal in the sense that he should not be too meticulous or pedantic in dealing with the evidence. The value of property should not be unduly depreciated in order that Government may acquire as cheaply as possible, and seeing that an exact calculation to annas and pies is usually impossible, the Court is justified in taking a broad view as favourable to the owner as the evidence permits. But, as in the case of any other judicial proceedings, the findings must be based upon evidence and legitimate deductions from it, and if there is an appeal, both the evidence and legitimate deductions are subject to reconsideration by the appeal Court. No doubt the party appealing must satisfy this Court that the judgment appealed from is wrong, and for the reasons which I have indicated, it may be more difficult to do that in land acquisition appeals than in other cases. But the same principles must apply as in ordinary appeals. It is not necessary to show, as Mr. Coyajee for the respondents suggested, that the judgment is perverse. It is enough to show that it is inconsistent with the evidence or based upon unsound deductions. We have been referred to a decision of the Privy Council in *Secy. of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (5), but I have not found anything in the judgment in that case which is in conflict with the views I have expressed. Their Lordships of the Judicial Committee themselves considered the evidence and weighed the deductions made in that case. (The judgment then dealt with each appeal on merits which is not necessary for purpose of this report.)

K.S. *Order accordingly.*

4. AIR 1922 Bom 399=68 I C 521=24 Bom L R 782.

5. (1901) 26 Bom 1=28 I A 121=8 Sar 1 (P C).

A. I. R. 1933 Bombay 364

BEAUMONT, C. J. AND MURPHY, J.

Panaji Girdharlal—Appellant.

v.

Ratanchand Hajarimal Marwadi — Respondent.

Letters Patent Appeal No. 8 of 1931, Decided on 10th February 1933, from decision of Madgavkar, J., in S. A. No. 913 of 1928.

(a) Decree—Execution — Money decree—Execution in different stages or piecemeal is not permitted—Decree for principal, costs and interest—Decree executed for principal and costs—Subsequent application for interest only is barred—Civil P. C. (1908), O. 2, R. 2.

It is not permissible to levy execution of a money decree in different stages or piecemeal. The rule is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time and if a person having a right to recover a certain sum under a decree asks the Court to enforce that decree for a less sum he must be taken to waive his right to levy execution for the balance : *Forster* v. *Baker*, (1910) 2 *K. B.* 636, *Foll.*; *AIR* 1926 *Cal* 1019, *Diss from.* [P 366 C 1]

A judgment creditor detained a decree for principal and interest up to date of payment and costs and applied for execution and executed it in respect of the principal and costs omitting interest. Subsequently he put in a fresh application for interest only.

Held: that the effect of the earlier application for portion of the amount due at the date thereof

was to prevent the judgment-creditor from making subsequent application for the balance. [P 366 C 2]

(b) Decree—Execution — Money decree — Judgment for principal and interest is single money decree—Civil P. C. (1908), O. 2, R. 2.

A judgment for principal and interest is a single money decree and cannot be said to give effect to different forms of relief. [P 365 C 2]

(c) Civil P. C. (1908), O. 2, R. 2—Application.

Order 2, R. 2 does not apply to application for execution. [P 365 C 2]

V. D. Limaye—for Appellant.

G. B. Chitale—for Respondent.

Beaumont, C. J.—This is an appeal under the Letters Patent from the decision of Madgavkar, J., given in second appeal, and the appeal raises a question of some importance in connexion with the law of execution. The plaintiff got a judgment for a sum of Rs. 1,359 and for costs of the suit and interest at the rate of 6 per cent per annum from the date of the filing of the suit. In the year 1924 the plaintiff filed a darkhast asking for payment of the principal sums awarded by the decree and costs. The form of the application follows Form 6, Appendix E to the schedule of the Civil Procedure Code. It states in para. 7, in accordance with the requirements of O. 21, R. 11 (2) (g), that the claim in suit is Rs. 1,359 to be paid to the plaintiff and costs and interest at the rate of 6 per cent per annum from the date of filing of the suit. Then in column 8 it shows what costs have been awarded and totals up those costs, with the sum of Rs. 1,359, as amounting to Rs. 1,615-10-8. Then in column 10 the plaintiff prays that the total amount of Rs. 1,615-10-8 and the costs of taking out this execution be realised by attachment and sale of defendant's movable property. So that what the plaintiff asks for is payment of the principal sum and costs awarded by the decree, but he does not ask for execution in respect of the interest awarded to him subsequent to the decree.

The amount claimed in that darkhast was paid by the judgment-debtor, and in the year 1926 the plaintiff took out the present darkhast asking for the interest awarded to him by the original decree, and for certain other costs which have been paid and upon which no question arises. The question we have to determine is whether the present darkhast, in asking for moneys covered by the original decree and not asked for in the first darkhast, is permissible. The trial Court held that the darkhast was bad. The lower appellate Court disagreed with that finding and held the darkhast good, and in second appeal Madgavkar, J., agreed with the lower appellate Court and held the darkhast good.

It was not disputed in the lower Courts, and has not been disputed here, that O. 2, R. 2, which prevents multiplicity of suits is not applicable to proceedings in execution. But one may observe that that order shows that the general policy of the framers of the Civil Procedure Code was to require parties who have got certain rights to assert them all at the same time and not piecemeal. Madgavkar, J., accepted two propositions, first that where the decree sought to be executed gives two different reliefs, for example, possession of immovable property and mesne profits, the decree may be executed separately in respect of the possession and mesne profits. There is plenty of authority in support of that proposition, upon which I desire to cast no doubt whatever.

The second proposition which the learned Judge accepted was that, generally speaking, piecemeal execution of a money decree is not permissible. But the view he took was that in the absence of any definite rule of law compelling the decree-holder to apply for interest at the same time as the principal it was permissible for the darkhast-holder to make separate applications for such principal and interest. So that, I think he really held that this case came within the principle that where a decree gives different reliefs it can be separately executed. I am not prepared to accept that view. It seems to me that a judgment for principal and interest is a single money decree and cannot be said to give different forms of relief, and I think that the question which we really have to consider is whether there is any objection in India to executing a money decree in several stages. Mr. Chitale for the respondent has contended that there is nothing in the Code which prevents piecemeal execution.

That no doubt is so, but the contention seems to view the proposition from the wrong angle. Under English law it

is not permissible to levy execution of a money decree in different stages. It has been held that where there is only one judgment for a sum of money there can only be one execution upon it : see *Forster* v. *Baker* (1). If piecemeal execution is permissible in India it seems to me that the party executing must show, not that that right is forbidden by the Code, but that it is conferred by the Code. There is nothing in the Code which expressly authorizes piecemeal execution, and a good many of the provisions of O. 21, which deals with execution, seems to me opposed to the idea that there can be more than one execution of a money decree. For example, R. 10, O. 21 provides for the execution of the decree, and not of a portion of the decree. R. 11 (2) (g) provides that in the particulars to be stated in the application for execution the amount, with interest if any due upon the decree, must be stated, and there is no express provision for stating the amount for which the execution creditor desires to levy execution.

Rule 15 provides for the execution of a decree passed jointly in favour of more persons than one and provides for the whole decree being executed by one of the joint holders, and does not confer any power on the joint holders to execute the decree to the extent of the respective interests. The proviso to R. 17 and the terms of R. 64 also seem to me to suggest that the decree must be executed for the amount payable under it. In my opinion, there is no authority for the proposition that a single money decree for sums immediately payable at the date of execution can be executed at different times. I think that the correct rule, and certainly the rule of convenience, is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time. We were referred to several cases and the only one which seems to me definitely against the view which I am expressing is the case of *Upendra Nath Bose* v. *K. B. Dutt* (2).

There the learned Judges accept the view expressed by Sir Barnes Peacock in an earlier case that piecemeal execution is not permissible, but they say that the objection should be taken to the first execution, and not to the second execution which is to recover the whole balance payable. With all respect to the learned Judges who decided that case, the question does not turn upon the legality of the first execution, but upon its effect. There is, I apprehend, no legal objection to a judgment-creditor giving up part of his rights. If a man recovers judgment for Rs. 1,000 there is nothing to prevent him saying that he is willing to execute it only for Rs. 500. That execution is not invalid, but the question is whether the effect of that execution is to prevent execution for the balance of the judgment-debt. To my mind that is the effect. I think that if a person having a right to recover a certain sum under a decree asks the Court to enforce that decree for a less sum, he must be taken to waive his right to levy execution for the balance. Certain cases were referred to by Mr. Chitale arising under Art. 182, Lim. Act, in which it was held that a darkhast for part of the amount due would be a step in execution which would prevent a subsequent darkhast from being time-barred. But the actual question which we have to decide was not considered or discussed in those cases. In my opinion, therefore this appeal must be allowed and we must hold that the effect of the earlier darkhast for a portion of the amount due at the date thereof was to prevent the judgment-creditor from taking subsequent darkhast proceedings for the balance.

Murphy, J.—The point we have to decide is whether, when a judgment-creditor has obtained a decree for principal and interest to date of payment and costs, and has applied for execution, and executed it in respect of the principal and costs, and subsequently puts in a fresh application for interest only —a prayer omitted in the previous application—he can be allowed to execute it, or is barred from so doing by the principle contained in O. 2, R. 2. O. 2, R. 2, does not apply to applications for execution and there is, in the rest of the Code, neither a prohibition against, nor permission for such procedure, and there is no case exactly in point. The case law, which has been relied on in the course of the arguments and by the appellate Judge who first heard the appeal, is con-

1. (1910) 2 K B 636=102 L T 522=26 T L R 421=79 L J K B 664.
2. AIR 1926 Cal 1019=53 Cal 532=96 I C 582.

tained in *Upendra Nath Bose* v. *K. B. Dutt* (2), *Somasundaram* v. *Chokkalingam* (3), *Balasubramania Chetti* v. *Swarnammal* (4), *Sadho Saran* v. *Hawal Pande* (5) and *Radha Kishen Lall* v. *Radha Pershad Sing* (6). Of these cases that of *Somasundaram* v. *Chokkalingam* (3) is the nearest analogy, but what was allowed to be executed there was a second application for interest on a sum which had been recovered from the person who had been paid, on the reversal of the decree in appeal, under which he obtained it.

The remaining cases allowing separate execution of different parts of the same decree really deal with matters which are essentially separate, such as a decree for possession and mesne profits, or for possession and costs. Mr. Chitale has also relied on certain cases which are really authorities on the question of what is a step-in-aid of execution in accordance with law, under the Limitation Act. But these do not seem to me to be in point in this matter. Rr. 10 and 15, O. 21, suggest that what should be prayed for is execution of the decree as a whole, and Form 6, Appendix E, seems to me to require a claim for principal and interest to be made in the same application, such a decree being essentially a money decree for the total amount in both cases. I agree that the decree appealed against must be reversed and the execution application dismissed with costs throughout.

V.B. *Appeal allowed.*

3. (1917) 40 Mad 780=38 I C 806.
4. (1913) 38 Mad 199=21 I C 32.
5. (1897) 19 All 98.
6. (1891) 18 Cal 515.

A. I. R. 1933 Bombay 367

RANGNEKAR, J.

Mahadeo Baburao Halbe—Appellant.

v.

Anandrao Shankarrao Deshmukh — Respondent.

Second Appeal No. 64 of 1931, Decided on 24th February 1933, from decision of Dist. Judge, Jalgaon, in Appeal No. 405 of 1929.

Civil P. C. (1908), O. 21, R. 16 — "Operation of law"—Meaning explained.

A transfer by operation of law means a transfer on the death or by devolution or by succession, and a transferee by operation of law would be a legal representative of the deceased decree-holder, or the person in whom the interest of the decree-holder has become vested under a statute, e. g., the Official Assignee of an insolvent under the Presidency Towns Insolvency Act, or the purchaser at a Court sale in execution of a decree. [P 368 C 1]

R, who was the adoptive grandmother of plaintiff, took possession of the properties on the death of her husband *G*, and was managing the same. She obtained a money decree against two persons payable in instalments and in execution of the decree received the first instalment. Plaintiff obtained a declaration that he was validly adopted by the widow of *G's* son and that he was entitled to take possession of all family property. Plaintiff applied to execute the money decree alleging that he was a transferee by operation of law as his grandmother had produced the copy of the decree in the execution taken by her: *Held* : that plaintiff was not a transferee by operation of law within the meaning of O. 21, R. 16 and that he was not entitled straightway to execute *R's* decree.

Held further : that the only course open to him was either to apply in execution of his own decree for the appointment of a receiver of *R's* decree or to follow the procedure laid down in O. 21, R. 53, if it was contended that the decree in his favour gave him the right to proceed in accordance with that rule. [P 368 C 1,2]

T. N. Walawalkar—for Appellant.

Y. V. Dixit—for Respondent.

Judgment.—The principal question in this appeal is whether the respondent has a locus standi to apply for executing a decree obtained by one Rangubai against the appellant in Suit No. 162 of 1922 ; and this turns upon the construction of O. 21, R. 16, Civil P. C.

Order 21, R. 16, regulates the procedure to be followed in a case where the interest of the decree-holder is vested in a person other than the decree-holder. It runs as follows :

"Where a decree...is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it ; and the decree may be executed in the same manner and subject to the said conditions as if the application were made by such decree-holder : Provided etc."

It is clear on the record in this case that there was no assignment in writing. Mr. Dixit however contends that the respondent became a transferee of the decree by operation of law. He says that by reason of the fact that the decree passed in Suit No. 422 of 1920 in favour of the respondent ordering Rangubai to deliver the property belonging to Ganpat and the further fact that in execution of that decree amongst other things a copy of the decree of 17th June 1922 was produced by Rangubai, the respondent became a transferee by operation of law. In the first place there was no evidence before the Courts below as to why and how this decree was produced

or whether it was delivered to the respondent, and there is nothing about this in the judgment of the appellate Court. It is mentioned in the judgment of the Court of first instance however that a copy of the decree was produced in the proceedings which took place in the execution of the respondent's decree in his suit. Then there is the further fact that there is nothing to show that the moneys or the debt in respect of which the decree was obtained by Rangubai was a part of the estate of Ganpat. For aught one knows it may be her stridhan and the production may be the result of a mistake or misapprehension or carelessness. In fact neither of the Courts has gone into this question and the parties have not, as far as I can see, led any evidence about it.

It is a significant fact that the decree in favour of Rangubai was made in 1922 and the debt in respect of which it is passed was not mentioned in the list of properties given in Suit No. 422 of 1920. and the decree in this suit as it stands does not specifically refer to the decree of Rangubai. Assuming however that a copy of the decree was produced in the case of proceedings taken to carry out the decree in Suit No. 422 of 1920, the question is whether such production could make the respondent a transferee of the decree of 1922 "by operation of law" within the meaning of O. 21, R. 16. Apart from the facts which I have mentioned the question is, what is the meaning of the expression "by operation of law?" In my opinion, according to the natural meaning of the words, a transfer by operation of law means a transfer on the death or by devolution or by succession, and a transferee by operation of law would be a legal representative of the deceased decree-holder, or the person in whom the interest of the decree-holder has become vested under a statute, e. g., of the Official Assignee of an insolvent under the Presidency Towns Insolvency Act, or the purchaser at a Court sale in execution of a decree. No case has been cited bearing on the point in this appeal, but I am supported in the view that I am taking by the observations of the Privy Council in the case of *Abidunnissa Khatoon* v. *Amirunnissa Khatoon* (1), a case under S. 208, Civil P. C., of 1859, which was to the same effect as O. 21, R. 16, of the present Code. In that case it was observed as follows (p. 333) :

"Then we come to S. 208, which, undoubtedly, is a section relating to proceedings for execution and after judgment and decree. It is to this effect : 'If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred, or by his pleader ; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder.' It appears to their Lordships, in the first place, that, assuming Wajed to have the interest asserted, the decree was not, in the terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred on which the law could operate to transfer any estate from his mother to him. There had been no death ; there had been no devolution ; there had been no succession. His mother retained what right she had ; that right was not transferred to him ; if he had a right, it was derived from his father ; it appears to their Lordships therefore that he is not a transferee of a decree within the terms of this section."

The only course open to the respondent was either to apply in execution of his own decree for the appointment of a receiver of Rangubai's decree or to follow the procedure laid down in O. 21, R. 53, if it was contended that the decree in favour of the respondent gave him the right to proceed in accordance with that rule. Instead of doing this, he proceeded straightway to execute Rangubai's decree as if he was the proprietor of it and this he could not do as there was no assignment of the decree in writing in his favour, nor, in my opinion, was he a transferee by operation of law. In my opinion therefore the respondent had no locus standi to apply in execution of Rangubai's decree, and the Court had no jurisdiction to order execution to issue in his favour. In this view it is not necessary to go into the question of limitation. I would therefore allow the appeal and reverse the order made by the lower Courts. Respondent to pay the costs of this appeal. Each party to bear his own costs in the Courts below.

K.S. *Appeal allowed.*

1. (1876) 2 Cal 327=4 I A 66=3 Sar 677 (PC).

A. I. R. 1933 Bombay 369

PATKAR AND BARLEE, JJ.

Balkrishandas Venkatidas — Plaintiff —Appellant.

v.

Malakajappa Irappa Jolad and *others* —Defendants—Respondents.

First Appeal No. 306 of 1930, Decided on 23rd February 1933, from decision of First Class Sub-Judge, Bijapur, in Darkhast No. 350 of 1927.

(a) Civil P. C. (1908), S. 68 and Sch. 3, Para. 1, Cl. (b)—Decree sent to Collector for execution—Collector should let the land on premium to raise amount of decree.

Where a decree is sent to a Collector for execution under S. 68, Civil P. C., he should let the land on a premium to raise the amount of the decree. [P 369 C 1]

(b) Civil P. C. (1908), S. 68 and Sch. 3—Decree transferred to Collector for execution—Civil Court has no jurisdiction to interfere with order passed by him under Sch. 3—Jurisdiction.

The civil Court has no jurisdiction to interfere with order passed by the Collector under Sch. 3, Civil P. C., in respect of decrees transferred to him for execution under S. 68, Civil P. C.: *Case law referred.* [P 369 C 2]

(c) Civil P. C. (1908), Ss. 68 and 115—Decree transferred to collector under S. 68 —Collector is not Court and his order cannot be revised by High Court.

Where a decree is transferred to a Collector for execution under S. 68, he is acting judicially and is not a Court. Hence the High Court cannot revise or interfere with his order: *A I R* 1928 *All* 558, *Ref.* [P 370 C 1]

H. B. Gumaste—for Appellant.

C. R. Madbhavi—for Respondents.

Patkar, J.—In this case a decree was obtained on 15th December 1917, for Rs. 11,626-7-7 to be paid by instalments of Rs. 800 each. In July 1927, a darkhast was given to recover the 7th and the 8th instalments, amounting to Rs. 1,600 as principal and Rs. 173 as interest. The Subordinate Judge sent the decree to the Collector for execution. In May 1928 the Collector ordered the land to be leased to Melappa Andaneppa for 12 years on a yearly rent of Rs. 500 and the rent note was passed in the following year. In the lower Court an application was made to set aside the lease. The learned Subordinate Judge held that the action of the Collector was intra vires. It appears to us that under Sch. 3, Para. 1, Cl. (b), the Collector should have raised the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, and also under para. 7, Cl. (b) (i), by letting in perpetuity, or for a term, on payment of a premium, the whole or any part of the said property. The Collector therefore ought to have let the land on a premium to raise the amount of the decree. It is contended on behalf of the appellant that the Collector by fixing the amount of rent at Rs. 500 and ordering the rent to be paid to the decree-holder has varied the original decree which had made the amount payable by instalments of Rs. 800. It is contended on behalf of the respondents that the civil Court has no jurisdiction to set aside the order passed by the Collector in execution of the decree under Sch. 3. The contention is supported by the decision in *Krishna Das* v. *Ram Gopal Singh* (1), where it was held that when a decree has been transferred to a Collector for execution under the provisions of S. 68, Civil P. C., it is not competent to the High Court to interfere with the orders passed by him even though they may be obviously not warranted by the provisions of Sch. 3, para. 1 of the Code. It is no doubt true that there is a rule made by the Allahabad High Court which clearly provides that a civil Court has no power to interfere with the procedure of a Collector in the execution of a decree which has been transferred to him under S. 68. There is no corresponding rule framed by this Court to that effect, still the question remains whether a civil Court has power to interfere with the order of the Collector, who, according to S. 71, is deemed to be acting judicially.

It has been held in *Bhagwan Das* v. *Suraj Prasad Singh* (2) that the Collector executing a decree is not a Court. S. 70, sub-S. (1), Cl. (c), invests the Local Government with the power of making rules for providing appeals against the orders of the Collector in executing a decree transferred to him under S. 68. According to the decision in *Mancherji* v. *Thakurdas* (3), an appeal would lie to the superiors of the revenue officer, who has passed an order in execution under Sch. 3. In *Bhurchand Hansraj* v. *Vira Champa* (4) it was held that the civil Court, and not the Collector, had jurisdiction to determine the question whether the decree

1. A I R 1928 All 558=115 I C 125=50 All 827.
2. A I R 1925 All 146=84 I C 1031=47 All 217.
3. (1905) 7 Bom L R 682.
4. (1912) 37 Bom 32=17 I C 142

has been satisfied or not, but so far as the machinery necessary for the satisfaction of the decree is concerned, the Collector is the sole authority and the civil Court cannot interfere with the discretion of the Collector. The case of *Timmanna* v. *Govind* (5) refers to the power of a civil Court to interfere with the order passed by the Collector in execution of a partition decree sent to him for execution under S. 54, Civil P. C. The decree in the present case is sent under S. 68, Civil P. C., and sub-S. (2), S. 70, prevents the civil Court or any Court in exercise of any appellate or revisional jurisdiction from passing any order which is within the jurisdiction of the Collector to pass under sub-S. (1), S. 70. In these circumstances it appears that the civil Court would have no jurisdiction to interfere with the order passed by the Collector under Sch. 3, Civil P. C., in respect of decrees transferred to the Collector for execution under S. 68, Civil P. C. The appeal must therefore be dismissed with costs.

Barlee, J.—I am of the same opinion. Under the guise of an appeal against the order of the Subordinate Judge made on an application in connexion with the execution of a decree of his Court, we find an application for revision of an order made by a Collector purporting to act under the powers given him by S. 69 and Sch. 3, Civil P. C., on the ground that his order was ultra vires. I agree with my learned brother that we have no jurisdiction to revise the Collector's order. S. 115 empowers us to revise orders made by any Court subordinate to this High Court, but nowhere in the Civil Procedure Code is it enacted that a Collector is a Court and we can infer from Ss. 70 and 71 that the legislature did not intend that he should be a Court. Had it been the intention that he should be a civil Court, the legislature would certainly not have provided that appeals should lie from his decisions to the revenue authorities, and it would have been unnecessary to provide in S. 71 that he and his subordinates shall be deemed to be acting judicially. On this point reference may be made to the decision of Mukerji, J., in *Bhagwan Das Marwari* v. *Suraj Prasad Singh* (2), where the learned Judge says (p. 223 of 47 *All.*):

"The Collector is not a Court executing the decree. He is nowhere mentioned as a Court, and the legislature therefore found it necessary to say specifically that when a Collector exercises his jurisdiction in the matter of the excution of decrees, he should be deemed to be acting judicially."

I agree then that the appeal must be dismissed.

K.S. *Appeal dismissed.*

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5. A I R 1926 Bom 258=94 I C 656.

A. I. R. 1933 Bombay 370

WADIA, J.

George Anthony Harris—Plaintiff.

v.

Millicent Spencer—Defendant.

Testimony Suit No. 10 of 1931, Decided on 11th August 1932.

(a) Succession Act (1925), S. 263—Person applying for revocation must show that he is interested in will — Revocation can be effected either by application or substantive suit.

The person applying for revocation of the grant of probate or letters of administration must show that he is interested in the alleged will. That interest may be slight or even a bare possibility; but there must be some interest which the applicant is prima facie entitled to claim in the estate of the deceased. For revocation there may either be an application to revoke the grant or a substantive suit; but when the grant is revoked fresh proceedings have to be instituted in order to obtain proper representation to the estate of the deceased and that must be done by a petition under the Act: 4 *Cal* 360, *Ref.* [P 372 C 1,2]

(b) Succession Act (1925), S. 263— Proceedings for revocation of grant— Non-production of will—Presumption as to destruction by testator arises.

Where in revocation proceedings, no will is forthcoming the general presumption of law is that it must have been destroyed by the testator with the intention of revoking it, but the presumption is rebuttable. [P 372 C 2]

(c) Succession Act (1925), S. 263—Explanation of term "just cause" is exhaustive and not illustrative.

The explanation of the term "just cause" in S. 263 is exhaustive and not merely illustrative. Hence in order that an application for revocation of grant can be allowed, the application must fall under one or more of the said grounds. [P 373 C 2]

(d) Succession Act (1925), S. 300 — High Court will not grant letters of administration if proceedings are already pending before District Judge.

Under S. 300 the jurisdictions of the High Court and the District Court are concurrent and letters of administration would not be granted by the High Court if proceedings are already pending before a District Judge. [P 374 C 1]

(e) Succession Act (1925), Ss. 263 and 283 (1) (c)—Absence of citations does not in itself invalidate grant.

Section 283 (1) makes it discretionary for the Court to issue citations on all persons claiming to have an interest in the estate of the deceased, however slight that interest may be; but absence

of citations does not by itself invalidate a grant: 9 *I C* 354, *Foll.* [P 374 C 1]

L. Rodrigues—for Plaintiff.

G. C. O'Gorman—for Defendant.

Judgment.—The plaintiff has filed this suit for revocation of the grant of letters of administration to the estate of one Annie Maud Fenner deceased made by this Court to the defendant, who is the full sister of the deceased, on 25th June 1931; on the ground that the grant was obtained by means of false and fraudulent representations contained in her petition for letters of administration. The deceased was a resident of Manmad, but in or about January 1931, she came to Bombay to have an operation performed for removing a cataract in one of her eyes, and she died in the King Edward Memorial Hospital on or about 3rd March 1931. The plaintiff is the son of one Christian Harris, who is the son of a predeceased sister of the deceased named Matilda alias Henrietta. The deceased also left her surviving two sons and two daughters by another predeceased sister Ellen and a cousin by the name of John Lastings alias John Spencer. Plaintiff alleges that the deceased left an estate which inter alia consisted of four per cent. Improvements Trust Bonds of the face value of about Rupees 19,000 and some jewellery and cash, that these bonds belonged to the deceased herself but were kept in the joint names of herself and the defendant, and payable to the survivor of them, merely for the sake of convenience. The bonds were deposited for safe custody with the Imperial Bank of India, Bombay, and on the security of these bonds the deceased used to draw moneys for her purposes from time to time. Plaintiff further alleges that the deceased made a will on or about 24th October 1928, in which, after giving certain legacies, she gave and bequeathed all the rest of her estate to him. That will is not forthcoming. It is alleged in the plaint that the defendant has wrongfully concealed and suppressed the same, and in his evidence the plaintiff says the same thing by stating that the defendant is now withholding the same. There is however a writing in his possession which he says is the draft of the said will, and in April 1931 he applied to the District Court at Nasik for letters of administration to the estate of the deceased as her grand-nephew and legatee under the will. He also filed the draft of the will in the proceedings at Nasik. Defendant appeared in these proceedings through her advocate on 6th June 1931 to oppose the grant, and presumably the proceedings were thereupon stayed.

On 18th June 1931, defendant applied for letters of administration to this Court, and letters of administration were granted to her on 25th June 1931. Defendant says that she drafted the petition to obtain letters of administration herself without any assistance, and she got it typed by some one in this Court. On the grant of the letters the proceedings at Nasik were allowed to drop. In her petition the defendant stated that no will of the deceased had been found though due and diligent search had been made for the same, that she was the only surviving next-of-kin of the deceased, being the only surviving sister of the deceased, that she was entitled to the whole of the estate left by the deceased, and that no application had been made to any other Court for probate or letters of administration. The plaintiff says that these statements are false and fraudulently made, and he has therefore filed this suit for revocation of the grant, for receiver and for injunction.

The defendant contends in the first place that this suit is not maintainable on the ground that the plaintiff has no interest in the estate of the deceased. He is admittedly not an heir as on an intestacy, and his only interest would be as a legatee under a will which according to the defendant was destroyed by the deceased with the intention of revoking it. It is laid down in Mortimer on Probate Law and Practice, 1911 Edn., p. 585 (B), that an action for revocation of letters of administration granted on an intestacy may be brought by a person claiming an interest under an alleged will of the deceased for the purpose of having the grant revoked in order that he may obtain probate of the alleged will under which he claims to be interested. The contest in such a case lies between the administrator to whom letters of administration have been granted and the person alleging the existence of the will, and the contest which relates to the validity of the will is decided in one and the same proceed-

ing. If the will propounded is invalid, the Court pronounces against it, and the grant is re-delivered out to the administrator on a copy of the decree being filed. If the will is valid, the grant is revoked, and probate is ordered to issue in solemn form of law to the person entitled thereto. This is done in England in one and the same proceeding, and the question which arises is whether the same procedure also is applicable in India when a party applies for revocation of letters of administration and at the same time propounds a will as the last will and testament of the deceased. R. 639 of High Court Rules provides that in cases not provided for by Ch. 31 of the High Court Rules, or by the rules of procedure laid down in the Succession Act, 1925, or by the Civil Procedure Code, the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed so far as they are applicable and not inconsistent with that chapter and the said Acts.

There is no decided case in India, at least I have been referred to none, in which the procedure followed in England has been adopted, and it appears to me to be somewhat doubtful whether the same procedure can be followed here. In England a caveat can be lodged by the party applying for a revocation of a grant even after the grant has been made. S. 284, Succession Act, refers only to the usual caveat against the grant of probate or letters of administration, that is to say, to caveats filed before the grant is made. The grant of probate or letters of administration is the decree of a Court, and where it has been wrongly granted, an application can be made to the same Court which granted it to set it aside, and it seems that a regular suit is not always necessary: see *Komollochun Dutt* v. *Nilruttun Mundlê* (1), unless the grant is sought to be revoked on the ground of the invalidity of the will or on the ground of the any dispute as to its genuineness. There may therefore be either an application to revoke the grant or a substantive suit, but when the grant is revoked, it seems that fresh proceedings have to be instituted in order to obtain proper representation to the estate of the deceased, and that it must be done by a petition filed under the provisions of the Act.

It may be argued that if a suit is filed, there is no reason why the matter of the alleged will and the revocation of the previous grant should not be tried at the same time. The party propounding the alleged will may as plaintiffs seek to obtain revocation of the grant to the defendant. The defendant may be called upon to prove his title to the letters of administration, and then the plaintiff may contest the grant and lead his own evidence in support of the will. At any rate such a procedure will save multiplicity of proceedings and costs especially where the estate is a small one. As I have said, the point has not been decided before and is not free from doubt, and as we are governed by the Indian Succession Act, we cannot follow any rule of the English procedure which may be inconsistent with the provisions of that Act. The point however does not really arise for determination in this suit. There is no prayer in the plaint that the Court shall pronounce for the will sought to be propounded by the plaintiff on a draft and that the Court shall decree probate thereof in solemn form. The plaintiff applies only for revocation, and what is necessary both in England and in India is that the person applying for revocation must show that he is interested in the alleged will, i. e., in the estate of the deceased disposed of by the alleged will. That interest may be very slight. It has even been held that it may be a bare possibility. But there must be some interest which the applicant is prima facie entitled to claim in the estate of the deceased.

In this case admittedly no will is forthcoming, and the general presumption of law is that it must have been destroyed by the testatrix with the intention of revoking it. It is true that this presumption is rebuttable, but here the presumption is strengthened by production of certain letters which passed between the deceased and her cousin John Lastings alias John Spencer which have been exhibited on commission, in which she says that she had destroyed the will. The presumption is further strengthened by production of a subsequent will of 1929 made by the deceased which is however unattested, and therefore invalid in law. There is the further evidence of Mr. Lastings

1. (1878) 4 Cal 360=4 C L R 175.

himself in which he says that the deceased told him that she had revoked the will. On the other hand plaintiff has produced what he calls a draft of the will of 1928, and he says that he saw the original of this will on the birth of his son in August 1930, when it was shown to him and to his wife by the deceased herself. It is common ground that the deceased used to look upon the plaintiff as her son, and the plaintiff used to look upon the deceased as his mother. Plaintiff has admitted that there were occasional differences and disputes between him and the deceased which led to unpleasantness from time to time, but in spite of this unpleasantness it is his case that there was no reason why the will in his favour should have been revoked, and that in fact it had not been revoked but had been either suppressed or withheld.

I do not wish to say anything about the witness Tukaram, as he does not carry the plaintiffs' case any further. The question of the genuineness and the validity of the will or of the draft does not however arise for consideration at this stage on the application for revocation of grant of letters of administration nor can I throw out the application on the ground that the applicant has not adduced all his evidence to show that there is a will in existence which is valid and has not been revoked. The only matter which the Court has to consider upon such an application is to see whether the application falls under any one of the grounds laid down in S. 263, Succession Act. It is admitted that the will was made in 1928, and there is a dispute whether it has been revoked. Not having heard the whole evidence on either side, I cannot express any opinion in these proceedings about the genuineness of the alleged draft, nor on the point whether the draft now put forward is admissible to probate under S. 237 of the Act, for it will be on the person who propounds the draft will to show that the will has been lost or mislaid or destroyed by wrong or accident and not by the deliberate act of the testatrix herself with the intention of revoking it. I am satisfied on the evidence that has been led that prima facie the plaintiff has an interest in the estate of the deceased. He would have been entitled to enter a caveat to the petition for letters of administration on the strength of the alleged draft and to oppose the grant. I therefore hold that the suit is maintainable.

The next question is whether there is under S. 263, Succession Act, just cause for revocation of the grant of letters of administration. The power to revoke is discretionary, and a clear case showing just cause has to be made out. The explanation of the term "just cause" in the section itself is exhaustive and not merely illustrative, so that the application of the plaintiff must fall under one or more of the said grounds. Plaintiff alleges that the statements made by the defendant in her petition are false and fraudulent, and he relies on the statements that I have referred to before. It is clear that a grant obtained fraudulently is void ab initio. Taking these statements seriatim, I am satisfied that it was not a false and fraudulent statement on the part of the defendant when she said that after due search had been made no will of the deceased had been found, for all that the plaintiff filed in the probate proceedings in the District Court at Nasik was an alleged draft, which he could only have filed on the assumption that the will itself was not forthcoming. The other three statements, viz., that the deceased died leaving her surviving as the only next-of-kin, that she was entitled to the whole of the estate, and that to her knowledge no other application for probate or letters of administration with or without the will annexed, are false, but, in my opinion, they are not fraudulent, as there was no intention on the part of the defendant to deceive or to conceal. I must say here that I do not believe the defendant when she stated more than once that the petition for letters of administration was her own unaided composition, and I expected her to be more frank and straightforward with the Court than she actually was. I still believe her when she said that she considered herself to be the only surviving next-of-kin as the only surviving sister of the deceased, as in fact she is, and I also believe her when she said that the statement that no other application for probate or letters of administration had been made in any other Court referred to her own act in the sense that she herself had made none other than

her application for letters of administration to this Court. In my opinion however Cl. (c), S. 263 stands in her way. The three statements I have just referred to are untrue in fact, and even if they have been made inadvertently, as I hold they have been, one or the other of them had to be alleged to justify a grant to her alone.

It is true that under S. 219 (d) those who stand in equal degree of kindred to the deceased are equally entitled to the administration. Under S. 47 of the Act the defendant and the plaintiff's father and the children of the deceased sister Ellen would all share equally, but for purposes of letters of administration the defendant is certainly the nearest in degree of kindred to the deceased. However under S. 300 (1) of the Act the jurisdictions of the High Court and the District Court are concurrent, and letters of administration would not be granted by the High Court if proceedings are already pending before a District Judge. In fact all further proceedings in the High Court would then have to be stopped. The grant may also be revoked if proceedings in the High Court are defective, under S. 263 (a). S. 283 (1) (c) however makes it discretionary for the Court to issue citations on all persons claiming to have an interest in the estate of the deceased, however slight the interest may be, and though Illus. (2) says that the grant may be revoked, where parties who ought to have been cited have not been cited, it has been held by our appeal Court in *Digambar* v. *Narayan* (2), dealing with the corresponding sections of the old Probate and Administration Act of 1881 that absence of citations which are discretionary does not in itself invalidate the grant.

In my opinion therefore under S. 263 (c) there is just cause for a revocation of the grant of letters of administration. Ordinarily, revocation would follow, and under S. 296 of the Act the defendant would have to deliver up the letters of administration to this Court. The estate however is a very small one, and the fairest order I propose to make at present is not to revoke the grant, but to order the defendant to hand over the letters of administration to the Prothonotary and Senior Master of this Court, not for cancellation, but to be kept by him until the further orders of the Court. I also order the receiver to continue in possession of the estate until the further orders of the Court. If any application is made in this or any other Court for fresh representation, either with the alleged draft will annexed or without, within four weeks from this date, and fresh representation is granted, the grant of the letters of administration will stand revoked. If however no such application is made within four weeks, or if made, no fresh grant is made to anyone else in due course, I order the Prothonotary to redeliver the letters of administration to the defendant. After I had concluded my judgment in which I had left it open to the parties to take further proceedings, if any, for fresh representation to the estate of the deceased, either in this or in any other Court, within four weeks, counsel for the defendant suggested that in that case the letters of administration might be revoked, and an order should be made now for handing them over to the Prothonotary and Senior Master for cancellation, as the defendant has been advised to take fresh proceedings in this Court immediately. No objection was taken by counsel for the plaintiff. The order therefore I now make, in supersession of the order made above, is that the grant be revoked, and that the defendant do hand over the letters of administration forthwith to the Prothonotary. Receiver to continue in possession of the estate until the further orders of the Court. Costs of both parties to come out of the estate of the deceased.

K.S. *Order accordingly.*

2. (1910) 9 I C 354.

A. I. R. 1933 Bombay 374

WADIA, J.

Ramchandra Atmaram Khanolkar—Plaintiff.

v.

Tukaram Nana—Defendant.

Original Civil Suit No. 2612 of 1930, Decided on 2nd September 1932.

(a) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 2—Agriculturist—Definition—Generally Commissioner decides whether person's income is derived principally from agricultural sources—But Court decides whe-

ther he is agriculturist under second branch of definition.

It is generally left to the Commissioner of the High Court for taking accounts to determine whether a person's income is derived principally from agricultural sources, and that is generally done by ascertaining whether his income from agricultural sources exceeds his income from non-agricultural sources for a period of three years before the date of the suit. But it is for the Court to determine whether the person who claims to be an agriculturist under the second branch of the definition is a person who ordinarily engages personally in agricultural labour within the limits of the district to which the Act applies. [P 375 C 2; P 376 C 1]

(b) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 2 (1)—Word "ordinarily" means regularly and habitually and not casually.

The word "ordinarily" in S. 2 (1) means regularly and habitually and not casually whether it be for a longer or a smaller portion of the day. It does not mean solely. Hence a person who ordinarily engages personally in agricultural labour within the defined limits is an agriculturist irrespective of the proportions which his strictly agricultural income may bear to any other income accruing to him : *A I R* 1931 *Bom* 284 and 4 *Bom* 624, *Rel on* ; 37 *Bom* 398, *Ref.* [P 376 C 1]

(c) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 2—Onus of proof.

The onus of proof that a person is an agriculturist is on the person who sets himself up as an agriculturist. [P 376 C 1]

(d) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 2—Second branch of definition of agriculturist — Rules for determining nature and quantity or extent of work required to be done by agriculturist to bring within second branch stated.

It is really difficult for the Court to lay down any rules for determining the exact nature and quantity or extent of the work required to be done by an agriculturist to bring himself within the second branch of the definition. It may however be stated generally, first that it is not necessary for the agriculturist to engage personally in agricultural labour throughout the day; it is enough if he is engaged for a larger or a smaller portion of the day. It must however be an appreciable amount of work which he engages in, and not merely some casual or desultory work in the fields. Secondly, the agriculturist cannot be said to engage personally in agricultural labour if he gets the work done only through labourers, but he can still be said to be engaged personally, if he himself works side by side with the labourers employed by him. Thirdly, even if the principal income of the agriculturist is from non-agricultural sources, as for instance from a shop or from money-lending, he would still be an agriculturist, if he does an appreciable amount of agricultural work for a portion of a day. If he does engage himself in that manner, his attending to some other work during another portion of the day such as, writing books of account, or carrying on correspondence cannot necessarily deprive him of the status of an agriculturist under the second part of the definition. Fourthly, whether a person who claims to be an agriculturist has or has not any bullocks or agricultural implements of his own is a matter to be considered. But the mere want of possession of these is not conclusive against him. Fifthly, it is not necessary that the agriculturist should be engaged in agricultural labour personally throughout the year, as there are months when no agricultural work is done at all. But he should have been engaged personally in agricultural labour for at least one agricultural season before the date of the suit, and he should also be so engaged at the date of the suit. This is the minimum period. It is not necessary that during the agricultural season the agriculturist should work from day to day. His omission to work on a day or some days here and there will not matter, provided he has engaged personally in agricultural labour for the substantial portion of the agricultural season. [P 376 C 1,2 ; P 377 C 1,2]

B. K. Desai—for Plaintiff.

R. C. Chinai—for Defendant.

Judgment.—Plaintiff is the transferee of a mortgage of certain immovable properties situate at Brahmapuri in the Pandharpur taluka of the Sholapur District which was executed by defendant 1, as manager of a joint Hindu family, for Rs. 4,917-10-0, and has brought this suit against the defendants to enforce the mortgage security. Plaintiff prays (a) for a decree for the amount and the interest due thereon and the costs of the suit (b) in default of payment, for sale of the mortgaged properties, and (c) for a personal decree in the event of a deficiency. Defendant 1 has put in his written statement contending that he is an agriculturist, and that the Court has no jurisdiction in respect of prayers (a) and (c) of the plaint. By an order dated 18th March 1931 the suit was ordered to be placed on board for trial of issues whether defendant 1 is an agriculturist within the meaning of S. 2 (1), Dekkhan Agriculturists' Relief Act. S. 2 (1) provides that an agriculturist shall be taken to mean a person who by himself or by his servants or tenants earns his livelihood wholly or principally by agriculture within the limits of the district to which the Act applies, or who ordinarily engages personally in agricultural labour within those limits. Defendant 1 contends that he comes under both the branches of the definition, viz., that his principal income is from agricultural sources, and also that he ordinarily engages personally in agricultural labour. It is generally left to the Commissioner of this Court for taking accounts to determine whether a person's income is derived principally from agricultural sources, and that is generally done by

ascertaining whether his income from agricultural sources exceeds his income from non-agricultural sources for a period of three years before the date of the suit. But it is for the Court to determine whether the person who claims to be an agriculturist under the second branch of the definition is a person who ordinarily engages personally in agricultural labour within the limits of the district to which the Act applies.

The word "ordinarily" which occurs in S. 2 (1) shows that it is only a bona fide agriculturist who comes within the definition, and as has been held by Madgavkar, J., in *Sahoo* v. *Narayanshastri* (1), the word "ordinarily" there means "regularly" and "habitually" and not casually, whether it be for a longer or a smaller portion of the day. The word does not however mean "solely." The definition does not cover the case of a person who leaves his usual avocation and only temporarily engages personally in agricultural labour. It was pointed out by West, J., in *Tulsidas Dhunjee* v. *Virbussapa* (2) that

"the status of agriculturist and of trader is not to be taken up and laid aside momentarily in order to embarrass a creditor."

At the same time it is plain that any person who satisfies the condition imposed by the latter portion of the definition is an agriculturist irrespective of the proportion which his strictly agricultural income may bear to any other income accruing to him, whatever that proportion may be. If he ordinarily engages personally in agricultural labour within the defined limits, he is an agriculturist within the second part of the statutory definition : see *Bhika* v. *Raichand* (3). The onus of proof however is on the person who sets himself up as an agriculturist. (After examining the evidence, the judgment proceeded). It is really difficult for the Court to lay down any rules for determining the exact nature and quantity or extent of the work required to be done by an agriculturist to bring himself within the second branch of the definition. It may however be stated generally, first, that it is not necessary for the agriculturist to engage personally in agricultural labour throughout the day; it is enough if he is engaged for a larger or a smaller portion of the day. It must however be an appreciable amount of work which he engages in, and not merely some casual or desultory work in the fields. Secondly, the agriculturist cannot be said to engage personally in agricultural labour if he gets the work done only through labourers, but he can still be said to be engaged personally, if he himself works side by side with the labourers employed by him. He need not cultivate the lands all by himself. In fact defendant 1 could not be expected to cultivate twenty-six acres of land all alone. As I have already stated, the extracts from the Record of Rights for 1929-31 shows that he worked personally by employing labourers or also with their help.

Even before that period, according to the Record of Rights, one of these plots was in 1928-29 cultivated by him and one by Ramchandra though it was the turn of Ramchandra to cultivate both during that year. Thirdly, even if the principal income of the agriculturist is from non-agricultural sources, as for instance, from a shop or from money-lending, he would still be an agriculturist, if he does an appreciable amount of agricultural work for a portion of a day. If he does engage himself in that manner, his attending to some other work during another portion of the day, such as writing books of account, or carrying on correspondence cannot necessarily deprive him of the status of an agriculturist under the second part of the definition. It was contended that in several suits filed by defendant 1 on promissory notes he had actually described himself as a trader, but it has been laid down in *Kadappa* v. *Martanda* (4) that a person who describes himself as a trader is not thereby estopped from showing that he is an agriculturist, unless by representing himself as a trader he has induced the plaintiff to act upon that representation. There is no evidence of any such inducement here. It may also be stated that the defence of "agriculturist" has nothing to do with a man's wealth or social position in life. A difficulty may sometimes arise if a person follows two occupations side by

1. AIR 1931 Bom 284=131 I C 895=55 Bom 411.
2. (1880) 4 Bom 624.
3. (1913) 37 Bom 398=18 I C 380.
4. (1892) 17 Bom 227.

side and at the same time, for then the question will be, which of these two occupations he ordinarily follows: see *Savalpuri* v. *Bala* (5). In that case however it was not suggested that the agriculturists who were all "bairagis" or mendicants came within the first branch of the definition, and the appeal Court held that they could not take advantage of the second part, because they followed two distinct occupations, and the question was which was the occupation they ordinarily followed. In my opinion that statement, as it stands, is much too wide, and in any event it is not consistent with the judgment of the appeal Court in *Bhikha* v. *Raichand* (3) and the judgment of Madgavkar, J., in *Sahoo* v. *Narayanshastri* (1) to both of which I have referred above. Even if a person follows another occupation during some portion of the day, he may still be an agriculturist if during another portion of the day he engages ordinarily, that is, habitually and regularly, in agricultural labour. He cannot follow two occupations at the same time of the day. Fourthly, whether a person who claims to be an agriculturist has or has not any bullocks or agricultural implements of his own is a matter to be considered. But the mere want of possession of these is not conclusive against him.

In this case the first witness examined on commission stated that defendant 1 had no bullocks nor implements, but that statement cannot be correct, because defendant 1, as I believe him, does the work of weeding out the superfluous plants and cutting the stalks and separating the ears from the stalks and for that purpose he must have some implements. Fifthly, it is not necessary that the agriculturist should be engaged in agricultural labour personally throughout the year, as there are months when no agricultural work is done at all. It was held in *Tulsidas Dhunjee* v. *Virbussapa* (2) that an agriculturist must have earned his livelihood by farming for at least one full agricultural season before the suit, and similarly I would say that he should have been engaged personally in agricultural labour for at least one agricultural season before the date of the suit, and he should also be so engaged at the date of the suit. This is the minimum period. It is not necessary that during the agricultural season the agriculturist should work from day to day. His omission to work on a day or some days here and there will not matter, provided he has engaged personally in agricultural labour for the substantial portion of the agricultural season. Defendant 1 was not only engaged personally in 1929-31, and also from April of this year, but he has stated that even before these two plots of land were mortgaged to him and Ramchandra in 1920-21 he had cultivated lands in Gopalpura taken on lease from the Jamkhandi State, though with the help of labourers. I have mentioned some of the important rules for guidance in determining whether a person comes within the second branch of the definition of "agriculturist." Applying these rules to the evidence that has been led in the case, and considering the evidence led on either side substantially, I am of opinion that defendant 1 has proved satisfactorily that he is a person who ordinarily engages in agricultural labour. I would therefore answer the issue in the affirmative. I also order that the plaintiff should pay defendant 1's costs of and incidental to the trial of the issue.

K.S. *Answer accordingly.*

5. (1912) 36 Bom 543=16 I C 341.

A. I. R. 1933 Bombay 377

BEAUMONT, C. J. AND MURPHY, J.

Sakharam Narayanbhat—Appellant.

v.

Poornanand Saraswati Swami—Respondent.

Second Appeal No. 47 of 1930, Decided on 16th February 1933.

(a) Deed—Construction — Grant of land—Rule regarding construction and resumption stated.

Where land granted is burdened with service it is not ordinarily resumable by the grantor, but where the grant is that of an office to which is annexed as remuneration of that office the enjoyment of land, then the grant may be resumed on the failure of the holder of the land to perform the duties of the office or on his ceasing to represent the office: *A I R* 1918 *Bom* 115 and *A I R* 1931 *P C* 157, *Foll*; *A I R* 1919 *Bom* 45; *A I R* 1920 *Bom* 73; 28 *Bom* 305 and 13 *M I A* 438 (*P C*), *Ref.* [P 380 C 1,2]

(b) Deed—Construction — Subsequent conduct of parties is irrelevant.

The subsequent conduct of the parties is irrelevant upon the question of the construction of the documents. [P 380 C 1]

(c) Deed—Construction—Grant of land in sub-inam — Two deeds — First appointing

grantee as agent to collect dues to math — Second making hereditary grant of maintenances—Service was held not condition of continued enjoyment of land.

In the year 1795 predecessor of the plaintiff, swami of a math, granted two servey numbers to the ancestors of the defendant, in sub-inam. The grant was under two deeds. The first deed purported to appoint the defendant's ancestor of those days as a sort of local agent or manager for the math, his duties being to collect certain dues, which apparently go to the math as of right and certain income from land owned by the math. The second document executed two days later made a grant in sub-inam, of the two survey numbers which were held by the math as inam, to the defendant's ancestor and on the face of it this grant purports to be one for maintenance, the only condition being as to the daily performance of certain ritual observances, which are ordinarily performed by all Brahmins. The plaintiff claimed possession of the two survey numbers on the ground that the land was given on terms that services were to be rendered by the defendant's family, and such services not having been rendered, the plaintiff was entitled to forfeit land and resume possession:

Held : on the construction of two documents: that the second grant taken by itself was not a grant of service land, it was a mere grant of land for a heritable estate for the maintenance of the grantees and even assuming that the two documents should be read together, performance of services referred to in first grant cannot inferentially be made a condition of the continued enjoyment of the land, still less could it be held that the services extended beyond the lifetime of grantee. [P 379 C 2]

(d) Deed—Construction—Grant—Holder of office.

An authority to an agent to collect dues does not constitute him the holder of an office. [P 379 C 1]

M. R. Jayakar and *D. R. Manerikar*—for Appellant.

G. N. Thakor and *G. P. Murdeshwar*—for Respondent.

Beaumont, C. J. — This is a second appeal from a decision of the District Judge of Belgaum. The plaintiff is suing for possession of two survey numbers and his case is that the land was given somewhere towards the end of the 18th century by his ancestors to the ancestors of the defendant on terms that services were to be rendered by the defendant's family, that those services have not been rendered, and that the plaintiff is entitled accordingly to forfeit the land and resume possession. The plaintiff has throughout based his title on two documents, which are Exs. 47 and 48, and the question which we have to determine in the first instance is whether on the true construction of those documents the land was in fact granted to the ancestors of the defendant on the terms that he should render services, and if so whether the possession of the land can be resumed by the plaintiff on those services not being rendered. In both the lower Courts that second question was not dealt with independently; the only issue raised was whether the grant was made by plaintiff's predecessors to the defendant's predecessors on condition that the grantee and his descendants should render service to the plaintiff's math at Chandagad. It seems to have been assumed that if in fact it was a service grant the failure to perform the services would automatically entitle the plaintiff to resume possession of the land. In construing the documents it is desirable to bear in mind the general proposition of law which has been established in a good many cases, namely that where you are dealing with land, and services connected with that land, the cases fall into two classes, first, where land is granted burdened with service, and secondly, where there is a grant of an office to which lands are annexed by way of remuneration. It has been held that in the first class of cases the lands are not resumable in the absence of some express provision making them resumable, but that in the second class of cases the lands are resumable in the absence of some provision to the contrary : see particularly *Chandrapa* v. *Bhima* (1) and *Lakhamgouda* v. *Baswantrao* (2).

Turning now to the documents, Ex. 47, which is dated 26th January 1795, is a document addressed by the swami of the math to the assemblage of Brahmins in certain specified places, and after some rather lengthy preliminaries the document states:

> "In your prantas (provinces) the Varshasanas (i. e. yearly allowances) continuing from year to year as well as certain directions in connexion with the institution (i. e. the math) are in vogue. As the Brahmin on behalf of the institution does not come, the said yearly allowances are not given effect to regularly. For this reason Vedmurti Rajeshri Narayanbhat Karande (who is the ancestor of the defendant) has been appointed as the Samsthanik Brahmin in your Prant. So all should obey his command."

Then various dues which are payable in the localities are referred to, and then the document goes on:

> "All this has been entrusted to the aforesaid Vedmurti; you should accordingly give the same to him year after year, "

1. A I R 1918 Bom 115=47 I C 330=43 Bom 37.
2. A I R 1931 P C 157=132 I C 736 (PC).

and then the Brahmins are directed to pay to him also the income of certain inam lands in their neighbourhood. Now taking that document by itself, it is merely an authority to the defendant's ancestor to collect various dues in certain districts, and there is nothing whatever in that document to suggest that the authority is of a hereditary nature and that the dues may be collected by the descendants of the agent after his death. Now is there anything whatever in that document to suggest that the agent is being appointed to an office? Plainly an authority to an agent to collect dues does not constitute him the holder of an office, if there is nothing more to go upon than that. Then the second document, Ex. 48, is dated two days later and that is addressed "To my dearest disciple Vedmurti Karande" (i. e. the defendant's ancestor, the agent appointed by the other documents). Then it says:

"The fields situated in your kasba are settled and given to you for your maintenance. You should give offerings to the deity and perform "Vaishwadev" ceremony and enjoy the fields from generation to generation. We shall allow the same as stated above in the regular succession of the Samsthan, and a Patrak (i. e. letter of command) in respect of the allowances in the prants has been given to you separately. You should be acting according to the same."

Now I will assume that the Patrak or letter of command in respect of allowances is the document Ex. 47 though that I think is not perfectly clear. But even on that assumption there is nothing in this document, Ex. 48, which expressly makes the enjoyment of the land granted conditional on the performance of the services referred to in Ex. 47. I may observe that the direction to give offerings to the deity and perform Vaishwadev ceremony is admittedly a mere recommendation to the grantee to perform the ordinary duties which a pious Brahmin would perform, and it is not suggested that those duties have been ignored. The argument on behalf of the plaintiff is that the two documents, Exs. 47 and 48, must be read together, that as by Ex. 48 the land is given for maintenance from generation to generation, we must hold that the services for which it is given, i. e., those referred to in Ex. 47, are also to be performed from generation to generation; that is to say, that we ought to hold that this is a grant of service land, and that the duration of the grant of the land is the measure for determining the period during which the services are to be rendered, and further that the persons for the time being in enjoyment of the land are those on whom the obligation of service rests.

In my opinion it is quite impossible to extract such a meaning from the two documents, even if they are read together. Ex. 48 taken by itself is certainly not a grant of service land; it is a mere grant of land for a heritable estate for the maintenance of the grantee, and even on the assumption that the Patrak referred to therein is Ex. 47 and that the two documents should be read together, I am not prepared to hold that the performance of the services is inferentially made a condition of the continued enjoyment of the land. Still less I am prepared to hold that the services to be performed, even if on the true construction of the documents they are a burden on the land, extend beyond the lifetime of the grantee. There is not a word in either of these documents to suggest that the services are to be performed after the death of the grantee, and I am not prepared to imply any such obligation. That being so, various interesting questions of law which have been discussed do not really arise. Mr. Thakore on behalf of the respondent has argued in the first place that these documents constitute the grant of an office. But that argument is, I think, based on the desire to bring the case within the authorities which say that land is resumable if it is granted as remuneration for the holding of an office, because there is really nothing in the documents to suggest that the ancestor of the defendant was appointed to any office. Then he has argued in the second place that this is a grant of land burdened with service, and that, although the general rule may be that land of that nature is not resumable in the absence of an express condition to that effect, there is an exception to that rule where there is wilful refusal to perform the services, and for that proposition he relies on the case of *Yamunabai* v. *Lagmanna* (3).

If I am right in thinking that at the most the services to be rendered were

3. AIR 1919 Bom 45=52 I C 770.

limited to the life of the grantee, it is not necessary to consider the effect of that case, whether it really amounts to an exception to the general rule that lands burdened with services are not resumable in the absence of an express condition or whether it was really a case, as one of the learned Judges who decided it clearly thought, of the grant of an office to which lands were annexed by way of remuneration. If in fact the only services to be rendered were services to be rendered by the original grantee, it is not suggested there was in fact any default. It is also unnecessary on that view of the case to consider as the lower Courts did, the subsequent conduct of the parties. On the finding of the lower Courts that this was a service grant it became necessary to consider whether the services had been rendered or not, but the subsequent conduct of the parties is irrelevant upon the question of the construction of the documents. In my opinion these documents are clear. There is no ground for holding that the grant of the land was conditional on the performance of services by the grantee and his descendants from generation to generation, and if that is so, the question whether services were in fact rendered or not is to my mind irrelevant. I think therefore that the appeal must be allowed and the suit dismissed with costs throughout.

Murphy, J.—The only question arising on the pleadings was whether a grant of two survey numbers in sub-inam made by the swami of the Kavale and Khanapur math in 1795 can be resumed on the refusal of the representative of the original grantee any longer to perform the service of local representative or an agent of the math. The law on the point is settled, for it depends on the nature of the grant. We have been referred to a series of cases including *Rukminibai* v. *Laxmibai* (4), *Lakhamgavda* v. *Keshav Annaji* (5), *Chandrapa* v. *Bhima Bin Dassappa* (1), *Lakhamgouda* v. *Baswantrao* (2), *Forbes* v. *Meer Mahomed Tuquee* (6) and *Yamunabai* v. *Lagmanna* (3). The general rule is that where land is burdened with service it is not ordinarily resumable by the grantor; but where the grant is that of an office to which is annexed as remuneration of that office the enjoyment of land, then the grant may be resumed on the failure of the holder of the land to perform the duties of the office or on his ceasing to represent the office. In the present case we are dealing with two documents executed so far back as 1795. It is obvious that we do not know the circumstances in which they were made, and it is very difficult for us to imagine any of the events of that time. The first grant purports to appoint the defendant's ancestor of those days as a sort of local agent or manager for the math, his duties being to collect certain dues, which apparently go to the math as of right, and certain income from land owned by the math.

The second document, which was executed two days later, makes a grant in sub-inam of two survey numbers which were held by the math as inam to the defendant's ancestor and on the face of it this grant purports to be one for maintenance, the only condition being as to the daily performance of certain ritual observances which are ordinarily performed by all Brahmins. The grant, it is true, does contain a reference to what we are told is the other document made two days earlier, the purport of it being that a "Patrak" has been issued as to the allowances. But where we have no other means of identifying the "Patrak," it is difficult to say whether the reference is to the earlier document, or not. It is clear that the first document is an appointment to some kind of duty, but the second is equally certainly a grant of of maintenance. It seems to me that in these circumstances we cannot read them together, as has been done by the learned Judges in both the Courts below. I think that on an interpretation of these documents it is not reasonably possible to hold, as they have done, that the grant was resumable, and that it comes within the rule of resumable grants, and I think that the lower Court's decisions were wrong.

V.B. *Appeal allowed.*

4. AIR 1920 Bom 73=56 I C 361=44 Bom 304.
5. (1901) 28 Bom 305=6 Bom L R 364.
6. (1870) 13 M I A 438=14 W R 28=2 Suth 358=2 Sar 588 (P C).

* A. I. R. 1933 Bombay 381

WADIA, J.

Suleman Haji Ahmed Umar—Plaintiff.

v.

P. N. Patell—Defendant.

Original Civil Suit No. 42 of 1927, Decided on 13th January 1933.

(a) **Registration Act (1908), Ss. 17 and 49—Agreement to lease—Agreement not creating present demise does not require registration and is admissible in evidence.**

In pursuance to a conversation between the parties, defendant wrote to the plaintiff agreeing to take a flat either on first floor or on the ground floor for five years commencing from a certain date. The letter ended by saying that the plaintiff should consider the letter as an agreement:

Held: that the letter was only a record of conversation, that on that date plaintiff had not decided which flat he would let to the defendant, that the letter did not create a present demise of either the one or the other flat, and that it did not require registration and was admissible in evidence: *A I R* 1919 *P C* 79, *Ref.*; *A I R* 1925 *Cal* 1087, *Dist.* [P 383 C 2]

Held further: that the test to be applied in construing a document like the letter is to gather from it the intention of the parties and to see whether it contains words or terms which can be construed as a present demise: *A I R* 1930 *Bom* 210, *Rel. on.* [P 383 C 2]

(b) **Evidence Act (1872), S. 91—Lease reduced to writing and signed by parties—Lessee failing to appear before Sub-Registrar to admit execution and consequent non-registration—Lessee cannot object to both admissibility of lease and oral agreement to lease.**

A lease deed was reduced to writing and signed by both parties, and when presented by the lessor for registration the lessee failed to appear before the Sub-Registrar to admit execution and consequently it was not registered. Subsequently in a suit by the lessor for damages for breach of agreement:

Held: that the lessee could not be allowed to contend that the lease was inadmissible for want of registration on his part and at the same time argue that the lessor could not rely on any oral agreement because the terms had been reduced to writing in the form of a lease to which he objected. [P 384 C 1]

* (c) **Transfer of Property Act (1882 as amendment by Act 20 of 1929), S. 53-A—Lease reduced to writing and signed by parties—Registration not effected owing to lessee's failure to admit execution before Sub-Registrar—Part performance of agreement—Suit by lessor for damages for breach of terms of lease—Lease is admissible though unregistered under S. 53-A.**

A lease deed for a period of five years was reduced to writing and signed by both parties but is was not registered as the lessee failed to appear before the Sub-Registrar and admit execution. Subsequently the lessee took possession of the premises one or two days before due date and remained in occupation for more than a year and paid rent. He then alleged that he was a monthly tenant and vacated premises after giving notice. In a suit by the lessor for damages for breach of the agreement:

Held: that the lease though unregistered, was admissible not only as evidence of part performance of the terms of the agreement contained therein, but also to show that the plaintiff can under S. 53-A enforce his right to claim damages for breach of the agreement as provided by one of its terms.

Held further: that apart from S. 53-A the lease could not be admitted in evidence: 17 *Mad* 456 (*F B*), *Dist.* [P 385 C 1]

(d) **Transfer of Property Act (1882 as amended by Act 20 of 1929), S. 53-A—Retrospective effect.**

Section 53-A has retrospective effect. [P 384 C 1]

* (e) **Transfer of Property Act (1882 as amended by Act 20 of 1929), S. 53-A—If conditions of S. 53-A are satisfied, all rights and liabilities are mutually enforceable.**

The agreement must be in writing, in which the terms must be set out with reasonable certainty, before the aid of the section can be invoked. If it is in writing and the transferee has taken possession in part performance of the agreement and is willing to perform his part of the agreement, certain equities arise between the parties to it. The section provides that in such a case the transferor is debarred from enforcing any right against the transferee other than the right created by the agreement partly performed notwithstanding that the transaction was not completed according to law. But it seems that all rights and liabilities under the agreement become mutually enforceable provided all the other conditions of the section are fulfilled, as the legislature could not have intended in recognizing an equitable doctrine to do equity to one party to the agreement and not to the other. [P 384 C 1, 2]

V. F. Taraporewala and *M. M. Javeri*—for Plaintiff.

L. Rodrigues—for Defendant.

Judgment. — Plaintiff has filed this suit to recover from the defendant a sum of Rs. 5,269-12-0 or such other sum as may be fixed by the Court by way of damages for breach of an alleged agreement to take a lease of the premises in suit for a period of five years at the rate of Rs. 325 per month commencing from 1st March 1924. Plaintiff and his father carried on business in Bombay in partnership in the name of Haji Ahmed Umar and Son up to June 1924, when the plaintiff's father died, leaving the plaintiff who was his only child as his sole heir and legal representative. During his lifetime plaintiff's father had purchased a property at Warden Road, Bombay, known as Ahmed Mansion, the conveyance of which was taken in the name of the plaintiff and his father as joint tenants. After his father's death the plaintiff became and still is the sole

owner of the said property. On 4th or 5th February 1924, plaintiff says that he had a conversation on the premises with the defendant about letting to the defendant a flat either on the first floor or the ground floor of Ahmed Mansion on a lease for five years with an option to the defendant to continue the tenancy for a further period of ten years. Plaintiff stated in his evidence that the rent for either of the two floors was to be Rs. 325 per month, but it appears that the rent for the ground floor was to be Rs. 350 per month. A type written agreement was shown to the defendant and the terms mentioned therein were to be embodied in a "pucca" lease. Defendant denies that he met the plaintiff either on 4th or 5th February, and says that he saw the plaintiff and his father at their "pedhi" at Khadak on 6th February 1924, and that at that interview the period of lease and the amount of the rent were agreed to, but that it was not then determined whether he should be given a flat on the first floor or on the ground floor. Defendant adds that the plaintiff's father and the plaintiff agreed to place one piece of expanded metal on the doorway. This interview was never put to the plaintiff in his cross-examination.

It is true that in para. 2 of the plaint the date of the agreement is given as 6th February, but in para. 2 of his written statement defendant does not admit the allagations contained in para. 2 of the plaint, save and except that he wrote a letter to the firm consisting of father and son on 6th February 1924. It is really immaterial whether the first interview took place on 4th or 5th February as the plaintiff alleges, or on 6th February, as the defendant alleges. The parties are agreed that the conversation that they had was before the defendant wrote the letter to the plaintiff's firm on 6th February 1924. That letter refers to the conversation which the defendant had, and it states that the defendant has agreed to take a flat either on the first floor at Rs. 325 per month or on the ground floor at Rs. 350 per month for five years commencing from 1st March 1924. Defendant further stated in the letter that he had agreed to take either of the two floors on the "conditions" mentioned in the letter. The letter ends by saying that the plaintiff's firm should consider the letter as an agreement. Plaintiff in his evidence stated that he had a conversasion with his father on receipt of the letter, and they decided between themselves on 7th February to let a flat on the first floor to the defendant. On the same day or on the next day plaintiff met defendant and communicated the decision to him to give him the flat on the first floor. Defendant agreed to take the first floor flat on hire at Rs. 325 per month for five years commencing from 1st March 1924. According to the plaintiff, defendant asked him to prepare a "pucca" lease which plaintiff got prepared at his pedhi and it was signed by the parties on 8th February 1924. Defendant however says that after 6th February he met the plaintiff for the first time on the 8th when the lease was already ready and engrossed and was signed. It was then lodged for registration. Plaintiff admitted execution before the Sub-Registrar of Assurances, but the defendant failed to do so. He entered into possession a day or two before 1st March 1924, and remained in occupation till about the end of August 1925, when he vacated, alleging that he was only a monthly tenant, and that he had given the proper and requisite notice to vacate.

There was some correspondence between the parties in August-September 1925, and the plaintiff filed this suit in the beginning of January 1927 to recover damages for breach of the agreement on the part of the defendant to take a lease of the first floor for five years at Rs. 325 per month. Defendant relies on the letter which he wrote on 6th February 1924, as an agreement between the parties constituting a present demise between the parties, and the question is whether it is admissible in evidence for want of registration, as under S. 2 (7), Registration Act, "lease" includes an agreement for lease. According to the defendant the letter falls under Ss. 17 and 49, Registration Act, and is inadmissible for want of registration. It is admitted that the premises which were actually let to the defendant were the first floor flat, and that the same was for the first time agreed to be let only on 7th or 8th February 1924. The letter is dated 6th February and in that letter the defendant

agrees to take the flat at either on the first floor or a flat on the ground floor. It is clear therefore that on 6th February plaintiff had not decided which flat he would let to the defendant, and in my opinion the letter cannot create a present demise on 6th February of either the one or the other flat, when the option to give one of the two had not then been exercised by the plaintiff and his father. The option was exercised and the decision communicated to the defendant on 7th or 8th February, so that there was no complete and concluded agreement on 6th February. The letter is only a record of the conversation between the parties, and not quite a correct record either. The words in the letter asking the plaintiff's firm to treat the letter as an agreement cannot make it an agreement in the absence of confirmation by the lessor.

Nor does the fact that either of the two flats was available for letting on 6th February serve to constitute a present demise on that day of the first floor flat. Counsel for the defendant mentioned the case of *Ramjoo Mahomed* v. *Haridas Mullick* (1), but in that case as in many other cases there were two letters, one by the lessee agreeing to take the premises, and the other by the lessor confirming the agreement, and it was held that the terms of the agreement as mentioned in the two letters created an immediate interest in the property let. It may be here mentioned that the mere fact that the holding is to commence at some future date after the agreement does not make any difference, and even an option of one of two dates from which the holding is to commence is immaterial. The premises, however, which are agreed to be let must not be left indeterminate as was done by the letter of 6th February. Moreover, the defendant stated in his letter that certain "conditions" mentioned therein had already been agreed to between him and the plaintiff and his father. Plaintiff, however, stated that he did not agree to put two pieces of expanded metal as mentioned in the letter. It is true that the plaintiff or his firm did not reply denying that condition, but the lease was prepared and signed within a couple of days after 6th February, and the plaintiff stated that no such condition was embodied therein. Though the letter mentions two pieces of expanded metal the defendant stated that only one piece was put up before he went into possession. Whether it was one piece or two pieces, it is not alleged anywhere that this was done between 6th and 8th February, and if it was done at some later date it does not follow that the plaintiff agreed to that condition on 6th February. I merely refer to this "condition" in order to show that even on that additional ground there was no concluded and final agreement on 6th February.

It has been held in *Sultan Ali* v. *Tyeb* (2), and in various other cases, that the test to be applied in construing a document like the letter in question is to gather from it the intention of the parties and to see whether it contains words or terms which can be construed as a present demise.

It has also been held that words like "agree to let" and "agree to take" are words of present demise: see *Bearpark* v. *Hutchinson* (3). But the words "I agree to take" used by the intending lessee in the letter of 6th February, cannot create a present demise of or interest in either of the two floors by the lessor in the absence of any confirmation by the lessor; and, further, as I have stated before, it is common ground that the premises which were ultimately demised were not fixed and determined till after 6th February. In my opinion the letter of 6th February cannot be construed as a present demise of the flat on the first floor of Ahmed Mansion and therefore does not require registration: see *Hemanta Kumari Debi* v. *Midnapur Zamindari Co.* (4). The letter is, therefore, admissible in evidence.

The suit is one for damages for breach of the agreement and is filed within time. I will deal with the admission of the lease in evidence later. The agreement between the parties was orally arrived at, though only partially, either on 4th or 5th or 6th February, but in any event before the letter of the 6th was written, and was not completed till

1. A I R 1925 Cal 1087=91 I C 320=52 Cal 695.
2. A I R 1930 Bom 210=125 I C 428.
3. (1830) 7 Bing 179=4 M & P 848=9 L J (o s) C P 1.
4. A I R 1919 P C 79=53 I C 534=46 I A 240=47 Cal 485 (PC).

either 7th or 8th February, when it was finally decided to let the flat on the first floor to the defendant and the defendant agreed to take it. Counsel for the defendant argued that the plaintiff cannot rely on any oral agreement when the terms of the agreement are reduced to writing by virtue of S. 91, Evidence Act. But all the terms of the agreement were admittedly not reduced to writing in the letter of 6th February. As to the lease the defendant cannot be allowed to contend that it is inadmissible for want of registration on his part, and at the same time argue that the plaintiff cannot rely on any oral agreement because the terms have been reduced to writing in the form of a lease to which he objects. Counsel for the plaintiff further argued that even if it was held that there was a present demise of the flat on the first floor, he would still be entitled to enforce his rights under the unregistered agreement by virtue of the provisions of the newly added S. 53-A, T. P. Act. This part of the case has not been pleaded in the plaint, as the section was not in force when the suit was filed. But it is a point of law, and no amendment was strictly necessary, nor was any objection taken by the defendant on that ground. S. 53-A deals with the doctrine of part performance of a contract, and is added by S. 16, T. P. (Amendment) Act (20 of 1929). S. 63 of Act 20 of 1929 lays down that certain amendments made by that Act shall not be deemed to affect the terms or incidents of any transfer of property before 1st April 1930. But S. 16 which introduces S. 53-A is not one of them, and, therefore, by implication S. 53-A can be said to have retrospective effect. That section gives statutory recognition to the equitable doctrine of part performance which Courts in India have applied in numerous cases, and which was applied in appropriate cases even by the Privy Council: see *Mahomed Musa* v. *Aghore Kumar Ganguli* (5).

The agreement, however, must be in writing, in which the terms must be set out with reasonable certainty, before the aid of the section can be invoked. If it is in writing, and the transferee has taken possession in part performance of the agreement and is willing to perform his part of the agreement certain equities arise between the parties to it. The section provides that in such a case the transferor is debarred from enforcing any right against the transferee other than the right created by the agreement partly performed notwithstanding that the transaction has not been completed according to law. But it seems that all rights and liabilities under the agreement become mutually enforceable, provided all the other conditions of the section are fulfilled. The legislature could not have intended in recognizing an equitable doctrine to do equity to one party to the agreement and not to the other. Counsel for the defendant argued that S. 53-A did not apply as the defendant was not willing to perform the contract after August 1925. The defendant entered into possession and paid rent for a year and a half, and it is not necessary that his willingness should continue throughout the period of the agreement, if there are substantial acts of part performance which are unequivocally referable to the written agreement.

If I am right in holding that this action has retrospective effect, then the question arises to which of the two documents it applies, for the terms of the document must be reasonably certain. The letter of 6th February 1924, as I have held before, does not contain all the terms of a concluded agreement. It not only leaves the premises undetermined, but refers to the terms of a typewritten agreement which are nowhere mentioned and are not in evidence before me. The "pucca" lease was however signed by the parties on 8th February 1924, and its execution was admitted by the plaintiff, but the defendant failed to admit execution before the Sub-Registrar, though the plaintiff says that he called upon the defendant to do so. Defendant says he does not remember having been called upon. But the fact remains that it was not registered as far as he was concerned. Is the lease then admissible, and if so for what purpose? S. 49, Registration Act, lays down that no document required to be registered shall affect any immovable property comprised therein or be received as evidence of any transaction affecting such property unless it has been registered. A proviso was added to that section by

5. A I R 1914 P C 27=28 I C 930=42 I A 1=42 Cal 801 (PC).

S. 10, Act 21 of 1929, and it runs as follows:

"Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Ch. 2, Specific Relief Act 1877, or as evidence of part performance of a contract for the purposes of S. 53-A, T. P. Act 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

The lease, in my opinion, is admissible not only as evidence of part performance of the terms of the agreement contained therein, but also in order to show that the plaintiff can under S. 53-A enforce his right to claim damages for breach of the agreement as provided by one of its terms. Both, the letter of 6th February 1924, and the "pucca" lease are admissible and should be marked as exhibits in the case. A question was raised whether apart from S. 53-A the lease was admissible in evidence in the absence of admission of execution by the lessee, viz. the defendant. A lease has been defined by S. 105, T. P. Act, as a transfer by the transferor, who is called the lessor, of a right to enjoy an immovable property for a certain time, for a consideration, and on the terms which are accepted by the transferee, who is called the lessee. Under S. 107 of the Act a lease, that is a transfer of an immovable property, for a period exceeding a year can only be made by a registered instrument. It is the lessor who creates an interest in the immovable property, and it was argued that it might be sufficient if the lessor got the lease duly registered as was done in this case, for the lessee only binds himself by covenants which are personal.

There is nothing in the Registration Act which makes the lease registrable by both the parties, though the Act provides the machinery to be adopted in cases where a party executing the lease denies its execution. All the relevant sections of the Act have been considered by their Lordships of the Privy Council in *Mohamed Ewaz* v. *Birj Lall* (6), in which it was held that if the registering officer refused under S. 35 of the Act to register a document quoad the person who denied execution, the section could not be extended to destroy the operation of the deed as regards the person who admitted execution. The proviso to S. 23 of the Act shows that the legislature contemplated a partial registration of a document. In that case the deed was a deed of sale, and all that the decision comes to is that the deed can be given in evidence against the person executing it. It does not decide the question as to what its effect is as regards the person not executing it. A lease, as I have stated, is made up of a transfer on certain terms, and the acceptance of these terms. Acceptance is defined by S. 2 (b), Contract Act, as the act of the person to whom a proposal is made which signifies his assent thereto. The lease has been signed by the defendant, and he has therefore signified his assent to its terms. But a lease is made up of two parts, a transfer and the acceptance, and it has got to be registered when it is for over a year.

It follows therefore that the acceptance must be registered too, and it can only be done when the acceptor admits his acceptance; in other words, admits execution. Counsel for the plaintiff relied on the case of *Raja of Venkatagiri* v. *Narayan Reddi* (7) and argued that the lease was admissible, apart from S. 53-A, T. P. Act, as the suit was not filed on an alleged title under an unregistered lease, but was only an action for recovering damages for a breach of the agreement. That case differs from the case of *Hurjivan Virji* v. *Jamsetji Nowroji* (8), in which there was an alternative claim for damages also. The document was however got prepared by the lessee, signed by him, and handed to the lessor who refused to sign. The appeal Court held that the document was not admissible to establish any contract for the purpose of drawing an inference from it. I have not been referred to any subsequent case of this High Court in which that decision has not been followed. In fact the correctness of the Madras High Court decision has been doubted by Sir Dinshah Mulla in his commentary on S. 49, Registration Act, at p. 178. In my opinion therefore apart from S. 53-A, T. P. Act, the lease cannot be admitted in evidence.

I have been also referred to the recent judgment of their Lordships of the Privy Council in *Ariff* v. *Jadunath Majum-*

6. (1877) 1 All 465=4 I A 166 (PC).

7. (1894) 17 Mad 456=4 M L J 198 (FB).

8. (1884) 9 Bom 63.

dar (9), in which the appellant had verbally agreed in 1913 to give the respondent a permanent lease of a plot of land and put him in possession but refused to grant the permanent lease in 1918 and filed a suit for ejectment in 1923. The Privy Council held that as the lease was not registered the appellant was entitled to eject the respondent ; but it was of the opinion that had the respondent's right to sue not been barred by limitation, as it was barred more than three years after the appellant's refusal in December 1918 to grant the lease, the respondent could have claimed execution of the lease and got it registered. It was held that the doctrine of part performance was not applicable, but in any event S. 53-A could not have been applied as the agreement was oral and not in writing. If it was applicable, the equitable relief given by the section, it seems, would be available to the parties even after the period of limitation to file a suit for specific performance had expired, subject of course to the other provisions of the section. There is no question of specific performance in the present case, as the plaintiff has re-let the premises to another after giving notice to the defendant. His only claim is for damages for breach of the agreement, and the suit is within time. The parties are agreed that the amount of damages payable by the defendant to the plaintiff is Rs. 5,000. There will therefore be a decree for the plaintiff against the defendant for Rs. 5,000 and costs and interest on judgment at six per cent per annum till payment.

K.S. *Suit decreed.*

9. AIR 1931 P C 79=131 I C 762=58 I A 91=58 Cal 1235 (PC).

A. I. R. 1933 Bombay 386

RANGNEKAR AND BROOMFIELD, JJ.

Lingangouda Gurangouda—Appellant.

v.

Sangangouda Bapugouda — Respondent.

First Appeal No. 555 of 1927, Decided on 2nd February 1933, from decision of Joint First Class Sub-Judge, Dharwar.

(a) Hindu Law—Partition—Possession for long time of separate shares by members of joint family—Partition can be presumed to have been effected even though it is impossible to prove as to how and when it happened.

The severance of joint status is a matter of individual volition. It may be effected by agreement. Where possession of different portion of joint family property by different coparceners can only be explained by assuming that there has been either a formal partition by metes and bounds or tacit agreement to separate, the Court is justified in assuming that partition has been effected in one way or the other, although, owing to lapse of time, it is impossible to prove by definite evidence how and when it happened. And the onus of proving that the property is joint lies on the coparcener who alleges it : 11 *M I A* 75 (*P C*); 10 *B H C R* 444; *A I R* 1929 *P C* 8 and 11 *Bom* 220 and 220*n* *and* 221*n*, *Ref.* [P 390 C 1, P 391 C 2]

(b) Limitation Act (1908), Art. 127—Long and exclusive possession of property by one coparcener is prima facie evidence of exclusion of another coparcener and suit by latter for partition is barred by Art. 127 even though he is also in possession of part of other joint property—Hindu Law—Partition.

Long and exclusive possession of property by one coparcener is evidence of the exclusion of another and the man who is out. has to make out a prima facie title and establish either an agreement or some jural relation to account for the exclusive possession of his opponent, or that the situation was due to any accidental circumstances such as, for instance, situation of the properties, of the residence of the parties and so on. If he fails to establish that, a suit by him for partition of such property is barred by Art. 127 even though he is in possession of part of joint family property : 21 *Bom* 325, *Foll* ; *A I R* 1919 *Mad* 531, *Diss. from.* [P 393 C 2]

(c) Hindu Law—Joint family—Mere possession of joint family property by one member and exclusive possession of such property by him, difference pointed out.

There is a clear distinction between mere possession and enjoyment of joint family property by one member of the joint family and active denial of title by him of any other member of the family or an exclusion by him of the other. Ordinarily the possession of one member of a joint family is on behalf of and for the benefit of all the members of the family, and a joint family may continue in state of coparcenary as long as they please, even if either by arrangement or owing to extraneous circumstances, such as residence in different places or situation of the properties in different localities or places, the members are in possession of separate properties. But when a member in separate possession of a property goes a step further and denies the title of another member of a joint family to enjoy or to participate in the profits of that property which he is holding separately, it would be an ouster or exclusion of the other from such property and time would begin to run even if the case is that the latter is in possession of other joint family property or even if there is some other property which is admittedly joint. [P 395 C 2, P 396 C 1]

D. A. Tuljapurkar and *G. R. Madbhavi*—for Appellant.

A. G. Desai and *K. J. Kale*—for Respondent.

Broomfield, J.—This is an appeal in forma pauperis from a decree of the Joint First Class Subordinate Judge of Dharwar dismissing the plaintiff's suit for partition and possession of a half share in property alleged to be joint family property of plaintiff and defendants.

The relationship of the parties was a matter of contest in the trial Court, the defendants alleging that the plaintiff is not even their kinsman. But it has been held (and is not now disputed) that the parties are bhaubands descended from a common ancestor, Venkanagawda, the defendants through his first wife and the plaintiff through his second wife. There is a genealogical table given in the judgment of the trial Court. The property in suit is valuable, consisting of patilki watan in two villages, Arshanagodi and Benkankop, the kulkarni watan in Benkankop and other lands in those and two other villages. The total area is roughly 1,000 acres producing an income of over Rs. 8,000 a year. The plaintiff is in possession and enjoyment of two fields, Survey Nos. 46 78/2, which form or once formed part of the patilki watan of Arshanagodi. The area of these is one and half mars which is about 32 acres. The income is about Rs. 200. This land has admittedly been in the possession of the plaintiff's branch from the time of his grandfather, Marigavda, who died in 1844 or soon after. In what capacity or by what right Marigavda acquired it is one of the matters in dispute. The plaintiff's case is that the land was given to Marigavda for maintenance (potgi) and that another one and a half mars were given as potgi to Marigavda's brother's son Ramanagavda alias Venkanagavda. The latter died without issue and his land apparently reverted to the defendants. But Marigauda's two fields have remained in possession of his descendants to this day not, according to the plaintiff, as their separate property, but as potgi lands enjoyed by them as members of the joint family. The defendants case, on the other hand, was that Mirgavda and his descendants were merely tenants of the two fields.

It was alleged in the written statement that Marigavda became divided from the main branch of the family 140 or 150 years before this suit was filed in 1923, which would mean, if that estimate could be taken strictly about 1770 or 1780. It was also alleged that the suit properties were acquired after Marigavda ceased to be a member of the joint family. The finding of the trial Court is that there was a separation some time between 1823 and 1843, that the Arshanagodi watan belonged to the family at that time and that Marigavda and his brother's son, as representing the branch descended from Venkanagavda's second wife, got three mars of the watan land as their share of the estate then existing. The Judge has rejected both the plaintiff's contention that the land is given as potgi and the defendants' contention that it was a case of ordinary tenancy. Mr. Tuljapurkar, who appears for the appellant, has argued that, in so finding, the Judge has made out a new case. He also complains that the finding that there was a division before 1843, in which the three mars came to the share of the descendants of the Venkangavda's second wife, is mainly based on a certain jamabandi chithi of 1844, Ex. 164, which, he says, has been misunderstood. But in a case in which we are concerned with such ancient history, the pleadings should not be construed too strictly. None of the parties can have any personal knowledge. If the evidence shows that there was a separation in interest, though at a time later than the defendants alleged, and that some of the suit properties were affected by it, in my opinion, the Court is not debarred from so finding. This document, Ex. 164, purports to be an extract from a jamabandi chithi prepared in 1844 in connexion with the Arshanagodi watan. The contents of it are correctly set out in para. 57 of the trial Court's judgment :

"It mentions two bans or main sharers. Karabasanagavda is one of these sharers while Rayavva Gaudasani is shown as another sharer. The share of Karabasanagavda's branch is shown as five annas four pies while that of Rayavva is shown as ten annas eight pies. The sub-sharers in Karabasanagavda's branch are shown as Ramangavda, two-annas eight pies, and Marigavda, two annas eight pies. The history of the watan is then given. It mentions that Rayavva, a woman of a different caste, was the owner of the whole watan first; that the ancestors of Karabasanagavda purchased one-third share of this watan from Rayavva during the reign of the

Peshwas; that Rayavva, while in possession of the remaining portion, ran away from the village in Peshwa's time; that Karabasanagavda's ancestors were in possession of that portion since then, and that the watan is therefore entered in their names."

It should be mentioned that Karabasanagavda and Ramangavda referred to here belonged to the defendants' branch of the family, being the grandsons of Venkanagavda by his first wife, while Marigavda, as already stated, was the plaintiff's grandfather. The conclusions which the learned Judge based upon this document are set out in para. 58. He ays that Marigavda cannot have been joint with the defendants' branch, because, if so, he would not have been shown as a sub-sharer in the watan. That appears to be correct. Prima facie the apportionment of these separate shares is inconsistent with the plaintiff's theory that the two branches formed one joint family. The learned Judge also infers that Marigavda must have already taken his share in the family property and suggests that the reason why he was content with a half share in one-third of the watan was that the title to the remainder, i. e., two-thirds standing in Rayavva's name was uncertain when he separated. This is more disputable. Ex. 164 is an isolated document and we have probably not sufficient materials for determining its full significance. We do not know that there was any uncertainty as to the title to Rayavva's two-thirds. We do not know for certain that the family at that time possessed no other property besides this watan.

The lower Court's finding however is not based solely or even principally upon this document. It appears that after the death of Venkangavda, the khata of the patilki lands stood in the name of Bharamagavda, one of his sons by his first wife and after Bharamagavda's death, about 1808, the name of his brother Mallangavda was entered. Mallangavda died in 1843, and there was an heirship inquiry under Regn. 16 of 1827, in which the plaintiff's grandfather Marigavda and the latter's nephew Venkangavda asserted a claim to be members of the family entitled to share in the watan, a claim which was denied by the members of the elder branch. The result of the inquiry was that Bapugavda, the eldest son of Bharamagavda, was entered as khatedar. He died in the same year 1843 and there was another heirship inquiry in which apparently Marigavda and his nephew made no claim. Bapugavda's brother, Karabasanagavda was entered as khatedar. He lived until 1892 and was succeeded by his son Shivangavda who however died in 1893. In 1894 defendant 1 in this suit obtained a certificate of heirship as the adopted son of Shivangavda. There were formal Court proceedings with a proclamation and public notices. The plaintiff did not appear to oppose or make any claim though he was then 44 years old, having been born in 1850. In 1904 an inquiry was held in connexion with the introduction of the Record of Rights. The plaintiff claimed to be entitled to Survey Nos. 46 and 78/2 and his claim was allowed. But he did not claim them on the ground that he was a member of a joint family with the defendants; he claimed them as owner. Subsequently an attempt was made by defendant 1 to dispossess the plaintiff of these lands on the ground that he was a stranger to the watan, but the attempt failed. In 1910 the District Deputy Collector held the plaintiff to be a watandar. To be exact, the order, which is Ex. 46, was: "On the evidence it cannot be said that the alienee (i. e., the plaintiff) is a non-watandar." It was then the plaintiff's turn and he attempted to remove the crop from a field in the possession of defendant 1. This led to criminal proceedings, which were compounded in February 1911 on the plaintiff's undertaking not to disturb the defendants' possession pending a decision of the dispute by the civil Court. The next event of importance was the present suit, though it was not filed till 12th February 1923. The trial Judge relied on all these circumstances. He has also relied on certain admissions of the plaintiff and oral and documentary evidence showing separate enjoyment of properties, separate accounts, separate entries of houses and cattle in the census, and conduct inconsistent with any claim by the plaintiff to be a coparcener or any recognition of that claim. He has rejected oral evidence adduced by the plaintiff to show that he and his father used to manage the defendant's lands as unreliable and absurd in view of the proved history of the family. His finding that Marigavda had taken his share

of the family property as it then was before 1843 is thus based upon the whole documentary and oral evidence and the probabilities arising from the proved facts. As to these probabilities he says in para. 71:

"Plaintiff admits that while the income of the lands in his possession was Rs. 200 per year, the income of the property in defendant's possession is Rs. 8,000 per year: vide Ex. 136. Would plaintiff or his father and grandfather keep quiet by taking a potgi of a 1/40 share for nearly a century and keep other sharers in opulence if they formed coparceners of a joint Hindu family? Why should Marigavda take potgi when he was entitled to a share? After the decision of 1843, Marigavda, Basangavda, or plaintiff. did not ever allege that they were coparceners along with defendants; much less did they ever claim a share till 1911, when plaintiff flushed up with the decision of the District Deputy Collector in his favour in the matter of his being a watandar, trespassed upon defendants' land and was at once prosecuted. What does this long silence from 1843 till 1911 suggest? It clearly shows, as already held by me, that Marigavda had already taken his share, that he attempted to set up a theory of potgi in 1843 when defendants' ancestors wanted to oust him even from his share calling him their tenant and that the matter was dropped by both parties as soon as the Assistant Collector gave his decision about the khata in 1843."

In my opinion there is great force in this reasoning. But even if the Judge is mistaken in his view that something like a regular partition had taken place before 1843, even if we hold that on the materials now available it is impossible to say in what circumstances or on what terms this small fraction of the Arshanagodi watan was assigned to or usurped by the junior branch, that does not, in my opinion, materially affect the case. The issue is not whether the defendants prove a partition at any particular time or at all, but whether the plaintiff proves that he is a coparcener of the joint Hindu family consisting of himself and the defendants. Now however the three mars came into the possession of the plaintiff's branch originally; it is a reasonable conclusion, I think, from the evidence taken as a whole, that since 1843 Marigavda's one and a half mars of land now in the plaintiff's possession have been held and enjoyed as separate property without any claim to a share as coparceners in the family property as a whole. In the heirship inquiry in that year Mallangavda's son Ramangavda, and Bharamgavda's sons, Bapugavda and Karabasanagavda, all gave evidence and all asserted that the watan property belonged exclusively to their branch of the family and that Marigavda and his nephew had no share in it. Karabasangavda stated that the latter were tenants of the watan lands in their possession. Mr. Tuljapurkar has disputed this interpretation of the statements Exs. 101, 38 and 103, but I agree with the trial Judge that this is the only meaning which can fairly be attached to them. Marigavda and his nephew no doubt asserted that they were still members of the family and heirs of Venkanagavda, but, as the Judge says, the natural inference from subsequent events is that the claim then made must have been abandoned. Mr. Tuljapurkar has argued that it was not necessary for the plaintiff and his predecessors to assert any claim in the various heirship inquiries after May 1843, because they were only concerned with the question who was to be shown in the revenue records as representative watandar and the orders did not decide any question of title. He relies on *Nirman Singh* v. *Lal Rudra Partab* (1), and on cases such as *Sangapa Malapa* v. *Bhimangowda Mariapa* (2) as to entries in the Collector's books not affecting title.

But the Privy Council case has no application here. There the persons sought to be excluded by entries in a register kept for fiscal purposes had admittedly been in joint enjoyment of the estate. The plaintiff's case here would stand on an entirely different footing, if there had been any similar recognition of joint status. The fact that his branch of the family was allowed to remain in possession of the two fields at Arshanagodi cannot be regarded as a recognition of joint status at all. That is a point which I shall develop further in dealing with the question of limitation. As for the watan proceedings being purely fiscal in character, that, at any rate, was no longer so after the Revenue Jurisdiction Act 10 of 1876 enacted that orders under the Watan Act could not be called in question in the civil Courts. In my opinion it is quite reasonable to regard the silence of the plaintiff's predecessors after 1843 as an indication that they

1. AIR 1926 P C 100=98 I C 1013=53 I A 220 =48 All 529 (P C).
2. (1873) 10 B H C R 194.

made no claim to share in the watan on the footing of coparcenership with the elder branch of the family; and as regards the properties enjoyed by the elder branch other than the Arshanagodi watan, I think we must accept the trial Judge's view of the evidence and hold that the plaintiff's branch never exercised nor claimed any rights in them at all until in 1911 the plaintiff took advantage of the finding that he was a watandar and forcibly carried off the crop from defendant 1's field. The question then is what conclusion follows from these facts. The severance of joint status is a matter of individual volition. It may be effected by agreement. Sir Dinshah Mulla in his book on Hindu Law, 7th Edn., p. 395, cites this passage from the judgment of the Judicial Committee in the well-known case of *Appovier* v. *Rama Subba Aiyan* (3), (p. 90):

". . . . when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

The same principle must apply if joint owners, who for the sake of convenience are in possession of separate shares, agree among themselves to continue their separate possession on the basis of legal severalty. In course of time it may become impossible to prove such an agreement, which may indeed be tacit and not evidenced in any formal way. But where, as in this case, the known facts can only be explained by assuming that there has been either a formal partition by metes and bounds or a tacit agreement to separate, the Court is justified in assuming that partition has been effected in one way or the other, although, owing to lapse of time, it is impossible to prove by definite evidence how and when it happened. In *Moro Vishvanath* v. *Ganesh Vithal* (4) West, J., says (p. 450):

"But though no such partition as this by mere operation of law is known to the Hindu system, it is equally clear that that system, like the English, respects an existing possession peaceably acquired, and raises, after the lapse of a considerable time, the presumptions by which it can be supported."

Then, after a discussion of the texts, he says (452):

"The result seems to be that as a cosharer may, by neglecting to assert his right, cause a presumption to arise, which cuts him off from participation altogether and makes him a divided member without any share in the family property, so a fortiori a similar neglect may cut him off with what he happens to possess, unless there has been some exercise or admission of reciprocal rights as to the several parcels of the property within so recent a period, that the presumption of separate ownership cannot, under the circumstances, reasonably be raised. An undisputed assertion of proprietary rights extending to the property actually possessed by other descendants from the common ancestor, will show that the several parcels are still held as shares of a common property. In the absence of such an indication, sole possession by several members of separate parcels may reasonably be taken in accordance with the ordinary presumption as proof of separate ownership."

Further, at p. 453, there is the passage frequently cited:

"It is a recognized principle that, when a Hindu family has once been proved to have been joint, it lies on those who assert a subsequent separation to prove it. The state of things shown to have existed is presumed to have continued, until the contrary be shown. But it is not inconsistent with this doctrine, and is, indeed, obvious that, as the course of nature itself brings about inevitable changes in a family, the presumption is one which grows weaker at each stage of descent from the common ancestor. Brothers are for the most part united; second cousins are generally separated. After a considerable lapse of time, testimony of the precise terms on which a partition was effected, and of the precise time at which it was made, will, in most cases, be wanting. The presumption that the old state of things continued, is, at some point, met by the presumption that the present state of things had a legal origin. . . ."

This case was approved of by the Privy Council in *Yellappa* v. *Tippanna* (5). Referring to the passage which I have just cited from *Moro Vishvanath* v. *Ganesh Vithal* (4) their Lordships say (p. 255 *of* 31 *B. L. R.*):

"The proposition is indeed one which speaks for itself apart from judicial authority. When it appears from facts that through generations a property has been possessed in a certain single line, it can never be said that it lies upon that line to establish that it was dissociated generations ago from another line which appears on the scene as a claimant and propones on facts of jointness, such as living in the same home, sharing in food or worship, or quoad estate participating in the enjoyment or fruits thereof."

The learned trial Judge has also cited three decisions from the Printed Judg-

3. (1866) 11 M I A 75=8 W R 1=1 Suther 657=2 Sar 218 (P C).
4. (1873) 10 B H C 444.
5. AIR 1929 P C 8=114 I C 13=56 I A 13=53 Bom 213=31 Bom L R 249 (P C).

ments of 1883: *Tatya* v. *Anaji* (6), *Vithoba* v. *Narayan* (7) and *Lachiram* v. *Uma* (8). These cases are also apposite and to the same effect. I hold for these reasons that the burden of proof on this issue has been rightly thrown on the plaintiff, that he has not discharged it, and that the trial Court's finding that he is not a coparcener with the defendants is correct. That finding is enough to dispose of the suit. But the lower Court has held, also in my opinion rightly, that the plaintiff's claim would in any case be barred by limitation. He and his predecessors have never been in possession or enjoyment of any of the properties in suit, except the two Arshanagodi fields, since 1843 when the defendants' predecessors openly asserted their exclusive claim. Prima facie that is more than enough to justify a finding that they have been excluded from any share, and to bar the suit under Art. 127 : see *Gangadhar* v. *Parasharam* (9). It has been urged that their possession and enjoyment of the two fields at Arshanagodi, which admittedly formed part of the joint family property at one time, saves the bar of limitation in respect of the properties in suit. That argument is negatived by *Vishnu Ramchandra* v. *Ganesh* (10), where it was held by Farran, C. J., and Strachey, J., that the fact that the plaintiffs were not excluded from their share in a part of the joint property did not prevent Art. 127, Lim. Act, from operating in respect of another part from which they had been excluded to their knowledge. The judgment does not give reasons for the finding on this point, which, it appears, was not pressed. But a reference was made to *Budha Mal* v. *Bhagwan Das* (11), and the judgments in that case contained, if I may say so with respect, full and cogent reasons. But *Vishnu Ramchandra* v. *Ganesh* (10) has been dissented from by the Madras High Court in *Kumarappa Chettiar* v. *Saminatha Chettiar* (12), and Mr. Tuljapurkar contends on the authority of that case that the view taken by this Court is contrary to the decision of the Privy Council in *Lakhshmi Devi Garu* v. *Surya Narayana* (13). Their Lordships of the Judicial Committee held in that case, according to Seshagiri Ayyar, J., that so long as there was no total exclusion of the claimants there can be no adverse possession in favour of persons holding portions of the property, while the learned Chief Justice in his concurring judgment laid down the proposition in this way, that to bar the plaintiff there must be exclusion from the whole of the joint family property and that exclusion from the suit property only will not do. These are not quotations from the decision in *Lakshmi Devi Garu* v. *Surya Narayana* (13), for no such expressions occur in Lord Davey's judgment. They are the learned Judges' views of the effect of that judgment. The facts in that case are thus summarised in the head-note :

"The last zamindar having died without issue in 1888 his widow was in possession when this suit was brought by a male collateral descended from a great-grandfather common to him and to the last zamindar. The plaintiff claimed to establish his right as a member of an undivided family holding joint property against the widow who alleged that her husband had been sole proprietor. In proof of this she relied on certain arrangements as having constituted partition, viz., that in 1816, two brothers, then heirs, agreed that the elder should hold possession, and that the younger should accept a village appropriated to him for maintenance in satisfaction of his claim to inherit : again, that in 1866 the fourth zamindar compromised a suit brought against him by his sister for her inheritance, on payment of a stipend to her, having already, on the claim of his brother, granted to him two villages of the estate ; and by the compromise this was made conditional on the sister's claim being settled ; again, that in 1871, the fourth zamindar having died pending a suit brought against him to establish the fact of an adoption by him, an arrangement was made for the maintenance of his daughter, and two widows, who survived him, the previous grant for maintenance of his brother holding good, the adoption being admitted, and the suit compromised."

The finding was that there was nothing in the above which was inconsistent with the zamindari remaining part of the common property, and that the course of the inheritance had not been altered. Dealing with the settlement in 1816 Lord Davey said (p. 265) :

"Their Lordships do not find any sufficient evidence in the arrangement made by these documents of an intention to take the estate out of the category of joint or common family pro-

6. (1883) 11 Bom 220n=(1883) P J 259.
7. (1883) 11 Bom 221n=(1883) P J 262.
8. (1883) 11 Bom 221n=(1883) P J 285.
9. (1905) 29 Bom 300=7 Bom 252.
10. (1895) 21 Bom 325.
11. (1886) 86 P R 1886.
12. A I R 1919 Mad 531 = 42 Mad 431 = 52 I C 470.
13. (1897) 20 Mad 256=24 I A 118 = 7 Sar 185 (PC).

perty so as to make it descendible otherwise than according to the rules of law applicable to such property. The arrangement was quite consistent with the continuance of that legal character of the property. The elder brother was to enjoy the possession of the family estate, and the younger brother accepted the appropriated village for maintenance in satisfaction of such rights as he conceived he was entitled to. In the opinion of their Lordships it was nothing more in substance than an arrangement for the mode of enjoyment of the family property which did not alter the course of descent".

Similarly at p. 268 we find :

" On the second point their Lordships agree with the Courts below that the course of descent of the zamindari was not altered by the compromise of 1871......"

The plea of limitation was disposed of very briefly by stating that (p. 268) :

" there has been no denial of the title of Janardhana and his family or exclusion of them from the estate."

In *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (14), another Privy Council case relied upon by the learned Judges of the Madras High Court, the plaintiff, who claimed a share in joint family property, had been in possession of a family house since 1858 and this house had been treated on two occasions, once when there was a family arrangement resulting in the separation of one of the sons and again when the father made his will, as continuing to be joint family property. It was held that that saved the bar of limitation. Their Lordships said at p. 60 that there had not been a total exclusion from the joint family estate as a whole. They did not themselves lay this down as a criterion. They referred to a case in which it had been suggested that this was necessary to lay the ground for the application of the statute, and said that if so there had been no such exclusion on the facts of the case.

So far as these cases are relevant at all on the particular point of limitation which we are considering, the principle which, in my opinion, really underlies them and the other cases cited in *Kumarappa Chettiar* v. *Saminatha Chettiar* (12) is that a joint owner cannot be said to be excluded from the joint estate if he has had such possession or enjoyment of part of the property as implies or is consistent with a recognition of his joint ownership of the estate as a whole. With the greatest deference to the learned Judges who decided *Kumarappa Chetttar* v. *Saminatha Chettiar* (12), I cannot find any support in these cases for the proposition which they have laid down, if it means, as it seems to mean, that possession of any part of the joint property however small, by a member of the family is necessarily enough to preserve his right to share in the other properties though he has in fact been excluded from them. Nor can I find any inconsistency between the cases referred to and *Vishnu Ramchandra* v. *Ganesh* (10).

Turning to the facts of the case, all that the plaintiff has succeeded in showing is that his branch of the family had some connexion with the Arshanagodi watan. He has completely failed to prove his case that the two fields, Surveys Nos. 46 and 78/2, were assigned to his branch of the family for maintenance. In 1844, if the jamabandi chithi Ex. 164 can be relied upon, his grandfather was recognized as holding a sub-share, two annas eight pies, in the watan. In 1856 his mother Mallayya made a statement Ex. 154 in which while agreeing to the continuance of Karabasanagavda as Patil, she claimed to be a sub-sharer in the watan under him. It does not appear that there has been any recognition of such a sub-share in the watan register since the date of Ex. 164. But supposing it could be held that the plaintiff's branch is entitled to a sub-share in the watan, that would obviously be no evidence of joint status as between him and the other watandars. It would rather negative it, for, if a watan belongs wholly to a joint family, there is no room for sub-sharers. It is really a stronger point for the plaintiff that the two fields, which he was separately enjoying, appear to have been shown in the watan register after 1843 as though they still formed part of the watan. This may have been due to the absence of any contest in the inquiries after 1843. It may show possibly that the elder branch maintained their claim to be the owners of these fields. But in my opinion, it certainly cannot be held to show that the defendants recognized the plaintiff's branch as being joint with them. So far as the rest of the property is concerned, it has all along been exclusively enjoyed by the defendants in a manner incompatible with the plaintiff's claim to be a coparcener.

1. (1880) 5 Bom 48=7 I A 181=4 Sar 173 (PC).

I therefore agree with the lower Court that the claim is barred by limitation. In my opinion the appeal fails and should be dismissed with costs. The appellant must pay the court-fees.

Rangnekar, J.—I agree. My learned brother has dealt exhaustively with the facts of the case and I have nothing to add. I think the conclusion reached by the learned First Class Subordinate Judge, as expressed in para. 73 of his judgment, that Marigavda had taken his share in the then family property before 1843 is correct. In my opinion, on the facts of this case, it was not strictly necessary nor was it possible for the Court to record a definite finding as to when and how the separation was effected. The sole question for determination was whether the plaintiff proved that he was a coparcener of the joint family consisting of himself and the defendants and whether the properties in the possession of the defendants were joint ancestral property in which he had a share. The learned Judge recorded a finding in the negative on both these issues and has written a careful and exhaustive judgment dealing with the facts of this case. Having regard to the circumstances mentioned by him in para. 71 of the judgment and the fact that since 1843 the defendants' branch denied the title or the right of the plaintiff's branch to the patilki office of the village of Arshanagodi and the whole of the watan in that village, and the further fact that since then the defendants' branch continued in exclusive possession and enjoyment of this property as also the other property in the village of Benkankop since its acquisition, establish a prima facie case of exclusion or ouster of the plaintiff's branch from the enjoyment of the property. Then the fact remains that in spite of this active, hostile and open assertion of the claim to possession of all the property to the exclusion of the plaintiff's branch, no steps were taken by Marigavda or his descendants to establish their right to any of the properties in the exclusive possession of the defendants' branch at a time when evidence was more easily available than at present. This is a circumstance of great importance indicating that no such attempt was made because of the belief of the plaintiff's ancestors that they never had any title or claim to such properties.

This brings me to the question of limitation. Apart from anything else, it is clear on the authorities that long and exclusive possession of property by one person is evidence of the exclusion of another and the man who is out has to make out a prima facie title and establish either an agreement or some jural relation to account for the exclusive possession of his opponent, or that the situation was due to any accidental circumstances such as, for instance, situation of the properties, of the residence of the parties, and so on. In this case no such attempt was made on behalf of the plaintiff to prove that, what appeared to be the exclusive possession of the defendants was not exclusive possession at all but was a possession on behalf of himself and the other members the family, and having regard to this fact and his own admissions, it seems to me to be clear that this is a case of clear exclusion of the plaintiff from what he alleges to be the joint family properties. The learned advocate on behalf of the appellant has however argued that his client has been in possession or enjoyment of two survey numbers in Arshanagodi village, that these survey numbers formed part of the joint family property and that these facts took the case out of Art. 127, Lim. Act. At the outset I am not satisfied that the plaintiff has succeeded in proving that at the date of the suit these two survey numbers formed part of the property of the only joint family which the defendants admitted. The plaintiff's admissions as well as the evidence show that he and his ancestors have been dealing with these two survey numbers as if they were the owners thereof. It is true that in 1843 it was alleged by Marigavda that he was in possession of these two survey numbers for his maintenance. But beyond his word there is nothing on the record to support this case. It is true that the plaintiff alleged in the suit that these two survey numbers continued to be held by his branch for the maintenance of the members belonging to it. As to this, again, there is no evidence except his allegation. There is no record. That fact was never recorded in the proceedings after 1843 which took place between

the parties or recorded in the inquiries held by the revenue authorities. The plaintiff's evidence on this point has been disbelieved by the learned Judge, and I see no reason to differ from him.

The plaintiff made a feeble attempt to show that these survey numbers were held by his branch as joint family properties by stating that they were cultivated and managed by Karabasangavda during his minority and that he was paying assessment with regard to it. On the question of assessment however he had to admit that the assessment was paid by him eight or ten years at least prior to the suit. He further stated that he was living with Karabasanagavda, during his (plaintiff's) minority, but it does not follow that, because a minor boy belonging to the family is brought up by another member of the family during his minority, that status of jointness continues as between him and the other members of the family.

But assuming however that these two fields are joint family properties, what is the position? The learned counsel for the appellant says that as his client has been in possession of two of the family properties, his claim to partition of the joint family property in the possession of the defendants will not be barred by limitation, even if the defendants prove that they have been in exclusive possession of the property for more than twelve years before the suit. He further says that the exclusion necessary to raise the bar of limitation under Art. 127 is total exclusion, that is to say, exclusion from the whole of the joint family property. The question thus raised came up for decision before this Court in *Vishnu Ramachandra* v. *Ganesh* (10), and it was answered in the following words (p. 328):

"The fact that the plaintiffs were not excluded from their share in other fields does not prevent . . . . the statute from operating in respect of the field from which they have been excluded to their knowledge."

I respectfully agree with that view. But Mr. Tuljapurkar relies on a decision of the Madras High Court in *Kumarappa Chettiar* v. *Saminatha Chettiar* (12), in which the Madras High Court has taken a different view and dissented from *Vishnu Ramachandra* v. *Ganesh* (10). The head-note of that case runs as follows:

"Where a member of a Hindu family who is divided in status from others is in enjoyment of some portion of the family properties, while others enjoy other portions, he is not in law excluded or ousted from those other portions, so as to disentitle him to his share of those portions however long their enjoyment by others."

In my opinion, the head-note states the law correctly and no exception can be taken to it. But I think the actual decision of the learned Judges, as it appears from their judgments, goes beyond the proposition contained in the head-note. Seshagiri Ayyar, J., held that there was no total exclusion of a coparcener, even if another coparcener is in separate and exclusive possession of a portion of the joint family property. The learned Chief Justice put the proposition in this way (p. 438 of 42 *Mad.*):

"If the property was undivided and Art. 127 is applicable, I entirely agree with him that to bar the plaintiff there must be exclusion from the whole of the joint family property and that exclusion from the suit property only will not do."

The principal judgment of the Court was delivered by Seshagiri Ayyar, J., and apart from the history as to the law of limitation, which luckily is not necessary to examine in this case, the learned Judge relies upon two Privy Council decisions in support of his view. The principal case on which the learned Judge relies is *Lakshmi Devi Garu* v. *Surya Narayana* (13). I am unable, with the greatest respect to the learned Judge, to see anything in the judgment of the Privy Council as supporting the proposition which he lays down. In that case, as appears from p. 258, the main question was whether the zamindari was the joint family property in the hands of the sixth zamindar, the widow's husband; or had ceased to be joint family property by reason of certain acts, which were alleged by the defence to have had the effect of partition, and to have altered the course of descent, so that the zamindari had become the separate property of her husband, the last owner, and the answer to this question depended upon the effect of certain razinamas executed between the parties and their ancestors. The principal razinamas were two razinamas of 1871 which were executed as the result of a compromise of a suit between one Janardhan and one of the widows in 1871. Before dealing with the razinama, their Lordships at p. 264 stated the question for decision as follows:

"The real question therefore is whether it has ceased to be part of the joint property of the family of the first zamindar, or . . . . whether there has been an effectual partition so as to alter the course of descent."

Then they considered certain documents executed between the ancestors of the parties in 1816, which do not seem to be very material, and at p. 266 referred to the razinama of 1871. They first stated the effect of the razinama which, to use their own words, was as follows :

"By this compromise Janardhana agreed that the plaintiff was the adopted son of his elder brother, that the right to the zamindari should pass to the plaintiff and that Janardhana should be enjoying or continue to enjoy . . . the villages of Vuddavolu and Addapusila attached to the zamindari which had been in his possession and enjoyment in accordance with the kararnama (this is the kararnama of 1816) executed in his favour by his late elder brother, and he also agreed to the provision to be made for Ramachandra's widows and daughter."

On the construction of these documents their Lordships held that there was nothing in them inconsistent with the zamindari, even if impartible remaining part of the common property. The question of limitation is disposed of in a few sentences at p. 268 in these words :

"Their Lordships also agree with the Courts below that the suit is not barred by the law of limitation. As between the appellant and the respondent the suit is not one for partition. The claim of the latter is not to hold jointly with the appellant, but to succeed adversely to her as one of the right heirs on the death of the last zamindar."

They further observed—and this seems to me to be very important—as follows (p. 268):

"There has been no denial of the title of Janardhana and his family or exclusion of them from the estate."

The suit was not one for partition. Further, their Lordships found that there was no denial of title of Janardhana or his exclusion from the estate, and it is difficult to see how this decision can be relied upon as supporting the view which is taken by the learned Judges in *Kumarappa Chettiar* v. *Saminatha Chettiar* (12). The other case relied upon is *Naik's* case, *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (14). In that case the facts were that the property consisted of a house at Sholapur and an ancestral business. The respondent quarrelled with his father, and the latter with his two other sons left the family house and lived at Belgaum. Some time thereafter the respondent brought a suit for partition in Bombay, but on a demurrer the suit failed. The father died in 1872. On the evidence the Court held that the property in question was ancestral, and that the respondent had not received his full share of it. In dealing with the question of limitation their Lordships observed (p. 59):

"How do the facts on this part of the case stand? The respondent was unquestionably a member of the joint family, with the full rights of a co-parcener, up to 1858. There is no suggestion of a formal partition between him on the one side and his father and brother on the other."

Their Lordships further found that the house at Sholapur was treated as joint property by the father and his other sons even after the father began to live separately and that the respondent continued to be a coparcener. On these facts their Lordships held that the case did not come within S. 1 of Act 14 of 1859. It appears that in the course of the argument an opinion of Holloway, J., in *Govindan Pillai* v. *Chidambara Pillai* (15) was referred to and it was with reference to that opinion that their Lordships observed as follows (p. 60) :

"Nor has there been a total exclusion from the joint family estate, as a whole, if that, as suggested by Holloway, J., in the case above referred to, is necessary to lay the ground for the application of the statute at all."

It is clear that the question which we have to consider was not specifically raised. There was no suggestion in the case that the respondent was excluded from the joint family property or that there could be no exclusion because he was in possession of the house. On the other hand the facts found were inconsistent with the case of exclusion or ouster. In these circumstances it is difficult to see how *Naik's* case (14) can be relied upon in support of the view which found favour with the learned Judges in *Govindan Pillai* v. *Chidambaram Pillai* (15). It seems to me that there is a clear distinction between mere possession and enjoyment of joint family property by one member of the joint family and an active denial of title by him of any other member of the family or an exclusion by him of the other. Ordinarily the possession of one member of a joint family is on behalf of and for the benefit of all the members of the family, and a joint family may continue in a state of

15. (1866) 3 M H C R 99.

coparcenary for as long as they please, even if, either by arrangement or owing to extraneous circumstances, such as residence in different places or situation of the properties in different localities or places, the members are in possession of separate properties. But when a member in separate possession of a property goes a step further and denies the title of another member of a joint family to enjoy or to participate in the profits of that property which he is holding separately, then it seems to me to be clear that it would be an ouster or exclusion of the other from such property and time would begin to run even if the case is that the latter is in possession of the other joint family property or even if there is some other property which is admittedly joint. I am unable to see on principle what difference there is in a case of exclusion from the whole of the joint family property or exclusion from one property *qua* that property. I am not aware of any principle of Hindu law or general law which would support the proposition which is advanced by the learned advocate for the appellant. To hold otherwise, separate and exclusive possession "continued even for centuries would afford no security to property." In my opinion the true principle is that there can be no exclusion if the separate possession of one person is consistent with a recognition of the right of another to claim a share therein. I think therefore the view taken by this Court, if I may say so with respect, is correct. In support of that view the learned Judges rely upon *Budha Mal* v. *Bhagwan Das* (11), and there with regard to this question it was observed as follows at pp. 211 and 212:

"As regards the question of limitation, I see no reason to think an exclusion from all ancestral property to be necessary to give rise to a bar by limitation. If this were so, limitation could not run in any case when a member of the family held a small portion of the ancestral property, while much the greater portion was held by others, and the right to a partition was denied on the ground that the property was already held in separate ownership. So long as the property continues to be held as undivided family property, limitation will not run against a member who has not been excluded from his share; but when the question is whether the property is in fact so held, there is no reason why limitation should not begin to run from the earliest date when the property can be shown to have been actually held by the person in possession adversely to the other members of the family. The circumstance that they may hold other property which, if they claim a partition, they must allow to be brought into the partition does not appear to be material. What is to be considered is the property out of the plaintiff's possession in which he claims a share, and as I find that the exclusion from a share in this property was known to the plaintiff's father at latest in 1854, and probably years before the plaintiff's claim is barred, whether Art. 127 or Art. 144, Sch. 2 should be applied. The only exception is the land at Bela Basti Ram in which the plaintiff's title was admitted in 1868 during his minority, and to which it does not appear that Rattan Chand, who survived till December 1872, ever asserted an exclusive right."

I agree therefore with my learned brother that the appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

A. I. R. 1933 Bombay 396

BEAUMONT, C. J. AND MURPHY, J.

Venubai Guracharya—Appellant.

v.

Damodar Vyasrao—Respondent.

Letters Patent Appeal No. 10 of 1932, Decided on 8th February 1933, from decree of Barlee, J., in S. A. No. 944 of 1930.

(a) Civil P. C. (1908), S. 47 (1) and (3)—Sub-S. (3) is not independent but is subject to limitation contained in sub-S. (1).

Sub-S. 3 (3) is ancillary to sub-S. (1) and comes into operation only where there is a question arising between the parties to the suit or their representative relating to the execution, discharge or satisfaction of the decree. It has no application to a case in which the dispute is between two rival representatives of one party: 25 *Bom* 631 and *AIR* 1932 *Pat* 329, *Foll.*; *A I R* 1927 *Rang* 45 and *A I R* 1925 *All* 578, *Dist.* [P 397 C 2]

(b) Civil P. C. (1908), O. 22, Rr. 3, 4 and 5—Scope—R. 5 does not apply to execution proceedings.

Rule 5 is merely ancillary to Rr. 3 and 4 and provides for any dispute arising on matters dealt with under Rr. 3 and 4 being determined by the Court in the suit, and therefore does not apply to execution proceedings. [P 397 C 2]

B. G. Rao—for Appellant.

G. R. Madbhawi—for Respondent.

Beaumont, C. J.—This is an appeal under the Letters Patent from a judgment in second appeal given by Barlee, J., and the case raises a question of procedure. The material facts are that in 1906 there was an award decree between a mortgagor and a mortgagee under which two survey numbers had to be handed back to the mortgagor on payment of a sum of Rs. 3,700 before April 1927. The mortgagor died in 1924, and

the present appellant is his widow, and claims to be his legal personal representative. She paid the amount due under the mortgage by the due date and filed darkhast proceedings claiming to recover the two survey numbers from the mortgagee or his representatives. The respondent of the present appeal also claimed to be the legal personal representative of the mortgagor, and on 24th August 1927, he made an application in the darkhast proceedings asking that the question regarding the rights of the legal representative should be decided if possible by taking legal evidence or the then present darkhast should be kept pending without awarding possession to the mortgagor's widow until the final disposal of the suit which the present respondent had filed. I may mention in passing that that suit filed by the present respondent to establish his right as legal representative of the mortgagor has so far failed.

The learned Subordinate Judge of Bijapur, in dealing with the respondent's application in the darkhast proceedings, observed that the question whether the present respondent or appellant is the legal personal representative of the deceased mortgagor was one which ought really to be decided either in an independent suit or in proceedings for probate. But he considered that he was bound to deal with the matter in the darkhast proceedings under O. 22, R. 5. He, therefore, took evidence on the question and rejected the application. There was then an appeal to the District Judge of Bijapur, and a preliminary objection was taken that no appeal lay. That preliminary objection was upheld by the learned District Judge. From that decision there was a second appeal to Barlee, J., who allowed the appeal and held that an appeal against the Subordinate Judge's order lay. As I have said, the learned Subordinate Judge dealt with the matter under O. 22, R. 5, and it is contended by the respondent that that rule has no application to execution proceedings His contention is that O. 22, R. 3, provides that on the death of the plaintiff his legal representative may be brought on the record, and that R. 4 provides that on the death of defendant his legal representative may be brought on the record, and then R. 5 provides that where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant such question shall be determined by the Court, then R. 12 provides that Rr. 3 and 4 are not to apply to execution proceedings.

The contention of the learned advocate for the respondent is that R. 5 is merely ancillary to Rs. 3 and 4 and provides for any dispute arising on the matters dealt with under Rr. 3 and 4 being determined by the Court in the suit, and that inasmuch as Rr. 3 and 4 do not apply to execution proceedings R. 5 also should be held not to apply. I am disposed to think that there is a good deal of force in that contention, and I doubt whether the learned Subordinate Judge had jurisdiction to deal with the matter under O. 22, R. 5. But it is not necessary to determine that point, because if the order was made properly under O. 22, R. 5, it is admitted that no appeal would lie, the order not being one appealable under O. 43, R. 1. The contention, however, of the present respondent in the lower appellate Courts and in this Court has been that the order was made, not under O. 22. R. 5, but under S. 47 (3), Civil P. C. The learned District Judge took the view that that section did not apply, and that even if it did, the order was not a decree. Barlee, J., took the view that the order was a decree and was made under S. 47 (3) and that that subsection should be read independently of sub-S. (1). Now sub-S. (1), S. 47, provides that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. Sub-S. (3) provides that where a question arises as to whether any person is or is not the representative of a party such question shall "for the purposes of this section" be determined by the Court. In my opinion sub-S. (3) must be read as ancillary to sub-S. (1) and only comes into operation where there is a question arising between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree, and it does not apply to a case of this sort in which

the question is between rival representatives of one party, the other party having throughout disclaimed any interest in the question.

The words "for the purposes of this section" in sub-S (3) seem clearly to introduce the limitations contained in sub-S. (1), and it is, I think, clear that it is impossible to read sub-S. (3) as an entirely independent provision. The legislature cannot have intended that where any question arises as to who is the representative of a deceased person who happened to be party to a pending suit that question can be determined in that suit. Before sub-S. (3) comes into operation there must be a dispute between the parties and it must relate to the execution, discharge or satisfaction of the decree. That view of the matter is in accordance with the reasoning of this Court in *Maganlal* v. *Doshi Mulji* (1), where it was held that S. 244 of the old Code did not apply to a question arising between a party to the suit and his representative. That position is very much the same as the position in this case where the dispute is between two rival representatives of one party. Barlee, J., thought that that case was distinguishable because it was decided under S. 244 of the old Code, which section, he says, in his judgment did not contain anything to correspond with sub-S. (3), S. 47 of the present Code. But therein he is wrong, because the last paragraph of S. 244 of the old Code is substantially in the same language as sub-S. (3), S. 47 of the present Code, the only difference being that under the old Code the Court had an option whether to decide the question or to stay the proceedings. Barlee, J., has referred in support of his judgment to the case of *Abdul Sattar* v. *Chi Dee Rhi* (2).

But that case is distinguishable, because there the dispute arose between persons who were parties to the suit although they were on the same side of the record, and all that the Court held there was that a dispute between persons, all of whom were plaintiffs or all of whom were defendants, came within S. 47 (3) and that it was not necessary that the dispute should be between parties on different sides of the record. Barlee, J., also referred to the case of *Khem Singh* v. *Raghubir Singh* (3), but in that case the contest was between the representatives of the decree-holder and persons claiming to be representatives of the judgment-debtor, so that the question there was between representatives of the parties. On the other hand, the case of *Md. Abdul Matin* v. *Mt. Bibi Hamidan*, *A. I. R.* 1932 *Pat.* 329, to which Mr. Rao for the appellant has referred us, supports the view of S. 47 (3) which I am taking. In my opinion, therefore, this case whether rightly decided under O. 22, R. 5, or not, at any rate, was not decided and could not be decided under S. 47 (3). In that view of the case it is not necessary to consider whether the order dismissing the present respondent's application, even if made under S. 47 (3), was a decree, and therefore appealable. In my opinion, the judgment appealed from was wrong, and we must hold that no appeal was competent from the learned Subordinate Judge's order. The appeal must, therefore, be allowed with costs.

Murphy, J.—I agree and have nothing to add.

V.B. *Appeal allowed.*

1. (1901) 25 Bom 631=3 Bom L R 255.
2. A I R 1927 Rang 45=99 I C 418=4 Rang 418.
3. A I R 1925 All 578=86 I C 1048=47 All 365.

A. I. R. 1933 Bombay 398

PATKAR AND BARLEE, JJ.

Keshavlal Sakhidas—Appellant.

v.

Amarchand Somchand—Respondent.

Second Appeal No. 455 of 1931, Decided on 1st February 1933, from decision of District Judge, Thana.

(a) Civil P. C. (1908), O. 2, R. 2 and S. 11 —Suit for setting aside sale—Claim for possession may not be joined—Separate suit for possession is not barred by S. 11 or O. 2, R. 2.

In a suit for setting aside a sale, though a claim for possession might have been made, it is not obligatory upon the plaintiff to make a claim for possession, and a second suit for possession will not be barred by res judicata, or S. 43 of the old Code or O. 2, R. 2 of the present Civil P. C. For though the two suits may arise out of the same transaction, they are in respect of different causes of action, the cause of action for possession arising only on the sale and sale deed being set aside: 18 *Bom.* 537 and *A. I. R.* 1925 *Bom.* 181, *Rel. on*; 41 *I. A.* 142 (*P C*) and *A. I. R.* 1929 *Bom.* 460, *Ref.* [P 400 C 2]

(b) Civil P. C (1908), S. 11 — Court in which issue is previously raised must be competent to try subsequent suit.

In order that a decision on a particular issue may operate as res judicata in a subsequent suit, the Court in which the issue is previously raised must be competent to try the subsequent suit or the suit in which the issue is subsequently raised: 29 *Cal.* 707 (*P.C.*), *Foll.* [P 401 C 1]

(c) Letters Patent (Bom.), Cl. 12—Suit for setting aside sale of immovable property is suit for land.

A suit for setting aside a sale of immovable property is primarily a suit for the determination of title to immovable property and would be a suit for land within the meaning of Cl. 12, Letters Patent: *A I R* 1927 *Bom.* 278 (*F.B.*), *Foll.* [P 401 C 2]

(d) Civil P. C. (1908), Ss. 11, 12 and 21 and O. 2, R. 2—Suit for setting aside alienation by mother acting as certificated guardian—Property situate in Thana—Order of appointment and authority to sell from Bombay High Court—Subsequent suit for possession—Suit held not barred by O. 2, R. 2—Purchaser could question jurisdiction of High Court passing decree on original side setting aside alienation—Letters Patent (Bom.), Cl. 12—Evidence Act (1872), Ss. 40 and 44.

The property in suit, which was situate at Thana, outside the original jurisdiction of the High Court, originally belonged to one *S.* On *S's* death his wife applied to the High Court and obtained an order appointing her guardian of the property and person of *A*, the minor son of *S*, and authorising her to sell minor's property and sold the property to one *K* in 1918, who in turn leased it. In 1923 *A's* mother died and in 1924 the new guardian of *A* brought a suit on the original side of the High Court for setting aside the appointment of the mother as guardian and for rescission of the agreement of sale and mesne profits which was decreed. In 1929 the minor's guardian filed a suit for possession of the property from the lessee and the purchaser. The purchaser inter alia contended that the decree passed by High Court was without jurisdiction, that the second suit was barred by S. 12 and O. 2, R. 2, as also by limitation on account of adverse possession, and claimed to be paid for improvements of land. Plaintiff invoked bar of res judicata by contending that High Court had no jurisdiction to pass the decree.

Held: (1) that the suit was not barred by O. 2, R. 2 as the cause of action in the previous suit was quite different from the cause of action in the subsequent suit though arising out of the same transaction, and also because the property having been outside the jurisdiction of the original side of the High Court, the High Court could not have granted the relief for possession; (2) that the purchaser's contentions were not barred by S. 11 for the same reason that the High Court on its original side was not competent to grant relief for possession; (3) that the decree so far as it decided question of title in the previous suit was without jurisdiction and nullity and (4) that S. 21 had no application and purchaser could contend under Ss. 40 and 44, Evidence Act, that the decision of the High Court was without jurisdiction. [P 402 C 1]

G. N. Thakor and *B. G. Thakor*—for Appellant.

H. C. Coyajee and *G. P. Murdeshwar*—for Respondent.

Patkar, J.—The property in suit belonged to one Somchand, the father of the minor plaintiff. After Somchand's death, the mother of the plaintiff Amrutbai entered into an agreement to sell the property in suit for Rs. 10,251 to defendant 2, the appellant, in 1917, and applied to the High Court on the Original Side in February 1918 to be appointed guardian of her minor son, the plaintiff Amarchand, of his person and property. In March 1918, she was appointed guardian of the person and property, and permission was granted to her to complete the agreement. In April 1918, a sale-deed, Ex. 64, was executed by her in favour of defendant 2. He carried out improvements and also fought out a litigation in respect of the land. After the death of the plaintiff's mother, the paternal uncle of the minor plaintiff brought a suit on the original side of the High Court in 1924 for setting aside the appointment of the mother as guardian and for rescission of the agreement of sale and mesne profits. Defendant 2 filed a written statement taking exception to the jurisdiction of the Court and asking for compensation to be paid for the purchase price and for the improvements effected by him. He remained absent and an ex parte decree was passed in December 1925 setting aside the appointment of plaintiff's mother as guardian and declaring the sale in favour of defendant 2 to be not binding on the minor.

The present suit was brought in the First Class Subordinate Judge's Court at Thana for possession of the property from defendant 1 who was a tenant on the land. Defendant 1 denied the plaintiff's ownership and contended that he was a tenant of defendant 2. Defendant 2 was made a party and contended that the decree of the High Court was without jurisdiction and not binding, that the present suit was barred by S. 12 and O. 2, R. 2, Civil P. C., that it was time-barred as the defendant was brought on the record more than 12 years after his possession commenced, and that the plaintiff was not entitled to possession without paying the pur-

chase money and adequate compensation for the improvements he had made. The learned Subordinate Judge held that the suit was not barred by O. 2, R. 2, that the suit was not barred by limitation, that the decree on the original side of the High Court was not without jurisdiction, that the defendant's contention was barred by res judicata, and that the plaintiff was entitled to possession of the suit property from the defendant without making any payment for improvements, though he recorded a finding that out of the sale price Rs. 8,551 made up of Rs. 3,300 which were paid for the satisfaction of the mortgage effected by the plaintiff's father on the property in suit, and Rs. 5,251 deposited with the Accountant-General and withdrawn by the plaintiff's present guardian, constituted benefit to the minor plaintiff, but that claim ought to have been made under S. 41, Specific Relief Act, in the suit on the original side of the High Court, under S. 39, Specific Relief Act.

The lower appellate Court held that the High Court on the original side had jurisdiction to set aside the sale and that decision operated as res judicata, that the decree of the High Court nullified the defendant's title and rehabilitated the plaintiff's title to immediate and unconditional possession, that the claim for compensation could not be put forward in the present suit for possession, and that the appellant might pursue his independent remedy, if any, in a different suit. It is contended on behalf of the appellant that the present suit is barred under O. 2, R. 2, that the decision of the High Court did not operate as res judicata, that the High Court decree is a nullity as the High Court had no jurisdiction to set aside the sale in respect of property which was situate beyond the jurisdiction of the original side, and that the suit was barred by limitation on account of the defendant's adverse possession.

The first question is whether the suit is barred under O. 2, R. 2. It is contended that as possession was not asked for in the suit on the original side of the High Court, the present suit for possession in the First Class Subordinate Judge's Court is barred as no leave was granted under O. 2, R. 2, sub-R. (3), Civil P. C. The plaintiff could not have asked for possession in the suit on the original side of the High Court as the suit would have been "for land" and the property was situated outside the jurisdiction of the original side limits of the High Court. The cause of action in the previous suit was quite different from the cause of action in the present suit. The plaintiff could not have asked for possession until the sale was set aside. The property being outside the jurisdiction of the original side of the High Court, it could not have granted the relief for possession. In *Saminathan* v. *Palaniappa* (1) it was held that although the claims in the two suits arose out of the same transaction, they were in respect of different causes of action, and therefore the second action was not contrary to S. 43 of the Code corresponding to O. 2, R. 2, Civil P. C., and could be maintained. It was held that the section is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise in the same transaction. The same view was taken in *Shankar* v. *Dattatraya* (2). The cause of action for possession would not arise until the sale-deed was set aside, and the claim for possession could not have been instituted on the original side of the High Court, as the suit would necessarily have been a suit "for land" Cl. 12, Letters Patent. I may in this connexion refer to the cases of *Nathu* v. *Budhu* (3) and *Krishnaji* v. *Sangappa* (4), where it was held that though a claim for possession might have been made, it was not obligatory upon the plaintiff to make a claim for possession, in a suit for specific performance, and a second suit for possession would not be barred by res judicata or S. 43 of the old Code or O. 2, R. 2, of the present Civil P. C. I think therefore that the present suit is not barred by O. 2, R. 2.

The second question is whether the defendant's contentions are barred by the principle of res judicata by reason of the decision in the suit of 1924 on the original side of the High Court. The present suit is for possession of the land

1. (1913) 41 I A 142=26 I C 228 (P C).
2. A I R 1929 Bom 460=122 I C 428.
3. (1893) 18 Bom 537.
4. A I R 1925 Bom 181=86 I C 137.

and the High Court on the original side could not have entertained this subsequent suit for possession, as the suit would have been "for land" and the whole of the land was outside the jurisdiction of the original side limits of the High Court. It is clear from S. 11, Civil P. C., that the Court in which an issue is previously raised must be competent to try the subsequent suit or the suit in which the issue is subsequently raised : see *Gokul Mandar* v. *Pudmanund Singh* (5). The decisions of both the lower Courts have been arrived at by an erroneous view of the application of the principle of res judicata. If the decision in the previous suit on the original side of the High Court does not operate as res judicata, all the questions in the present suit must be investigated afresh on the evidence led in the present suit, and the decision of the lower Courts must be set aside on this ground alone.

But it is contended on behalf of the respondent that the sale-deed was set aside by the High Court, and therefore the defendant's title on the strength of the sale-deed is extinguished and he cannot re-agitate that question in the present suit, and reliance is placed on the decision in the case of *Rajaram* v. *Central Bank of India* (6). The facts in that case are quite different from the facts in the present case. In that case a decree was passed in a suit which was good according to the law then existing, but the decree was sought to be set aside in a separate suit on the ground that the subsequent decision of a Full Bench altered the law, and it was held that a decided case could not be re-opened merely because the view that was taken on a question of law in that case was subsequently upset in another case between different parties. It appears that the decision of the Full Bench, that was relied upon before Fawcett, J., as creating a change in the view of the law, was itself set aside by another Full Bench of the High Court in *Hatimbhai Hassanally* v. *Framroz Eduljee* (7) and on that ground the appeal against the judgment of Fawcett, J., was dismissed : see p. 725 (*of* 51 *Bom.*) of the same volume.

Having regard to my view that the decision in the suit on the original side of the High Court does not operate as res judicata, it is not necessary to go into the question whether the High Court had jurisdiction to set aside the sale. Two reliefs were asked for in the High Court, first, for setting aside the appointment of the mother Amrutbai as guardian of the minor plaintiff, and, secondly, for setting aside the sale in favour of defendant 2 on the ground that Amrutbai was erroneously stated to be living within the jurisdiction of the original side of the High Court and that a false allegation was made as to the value of the property to the plaintiff's mother. The original side of the High Court had jurisdiction to set aside the order made by that Court under its inherent jurisdiction if it came to the conclusion that the order for appointment of the guardian was wrongly obtained. I think, so far as that relief was concerned, the original side of the High Court had jurisdiction, but in so far as the High Court declared that the sale-deed was invalid and operated to extinguish the title of the defendant to that land as purchaser, the suit would be, in my opinion, primarily a suit for the determination of title to immovable property and would be a suit "for land" within the meaning of Cl. 12, Letters Patent, according to the Full Bench decision in *Hatimbhai Hassanally* v. *Framroz Eduljee* (7). The decree of the High Court so far as it decided any question of title between the plaintiff and the defendant in respect of immovable property situate outside its original side limits was without jurisdiction and a nullity.

The learned District Judge therefore erred in holding that the decree nullified the defendant's sale and rehabilitated the plaintiff's title to immediate and unconditional possession. I have already reached the conclusion that the decision of the High Court did not operate as res judicata even apart from the fact that it had no jurisdiction to decide a question of title to land outside the limits of its original jurisdiction. The learned District Judge further erred in relying on S. 21, Civil P. C., and holding that the objection on the ground of jurisdiction must be considered to have been waived on the ground that it was not pressed before the High Court. The

5. (1902) 29 Cal 707 = 29 I A 196 = 8 Sar 323 (P C).
6. A I R 1926 Bom 481=98 I C 341.
7. A I R 1927 Bom 278=104 I C 8=51 Bom 516 (F B).

First Class Subordinate Judge is not an appellate or revisional Court from the decision of the original side of the High Court, and S. 21 therefore has no application. I think therefore that the decision of the suit on the original side of the High Court does not in any way bind the parties, and under Ss. 40 and 44, Evidence Act, the defendant could prove that the decision was passed without jurisdiction. It would therefore follow that both the Courts erred in not going afresh into all the questions of fact in this suit on the erroneous ground that the decision in the High Court suit operated as res judicata.

It is urged on behalf of the respondent that compensation ought to have been asked for when the suit for rescission was brought under S. 41, Specific Relief Act. On the other hand it is urged on behalf of the appellant that if it is held that the sale-deed is not binding on the minor plaintiff in this suit and the plaintiff is awarded possession from the defendant, the question of compensation in the shape of the return of the purchase money and for improvements can be gone into under Ss. 64 and 65, Contract Act, according to the decision in *Harnath Kunwar* v. *Indar Bahadur Singh* (8), or under S. 51, T. P. Act, according to the decision in *Harilal* v. *Gordhan* (9), or S. 41, Specific Relief Act, according to the decision in *Limbaji* v. *Rahi* (10), and reliance was also placed on Mayne's Hindu Law, paras. 219 and 220. As the point has not been gone into by the lower appellate Court, and the necessary facts have not been found, it is unnecessary to deal with the question in this appeal. That question will have to be gone into by the lower appellate Court after remand. The last point urged on behalf of the appellant is that the suit is barred by limitation on account of the adverse possession of the defendant. The plaintiff is still a minor and no question of adverse possession arises : see *Phoolbas Koonwar* v. *Lala Jogesh Sahoy* (11) and *Moro Sadashiv* v. *Visaji Raghunath* (12).

8. AIR 1922 P C 403=71 I C 629=50 I A 69=45 All 179 (P C).
9. AIR 1927 Bom 611=105 I C 722=51 Bom 1042.
10. AIR 1925 Bom 499=88 I C 643=49 Bom 576.
11. (1876) 1 Cal 226=3 I A 7=3 Sar 573=3 Suther 286 (P C).
12. (1891) 16 Bom 536.

I think therefore that the present suit is not barred by limitation or by O. 2, R. 2 and that the contentions of the defendant are not barred by the decision in the suit on the original side of the High Court. The result therefore is that the decree of the lower appellate Court must be reversed and the case must be sent down to the lower appellate Court for decision on the merits as regards the other issues arising in the case. Costs in this appeal will be costs in the appeal in the lower appellate Court.

Barlee, J.—One Somchand died in 1915 leaving a minor son, the plaintiff, and a widow Amrutbai. The last named contracted on behalf of her son to sell certain land at Ghatkopar to the defendant-appellant Sanghani. With the object of making his title secure she petitioned this Court for a certificate of guardianship and for express authority to complete the sale; and on 16th March 1918 the Court made an order appointing her guardian and authorizing the sale. The sale was completed and Sanghani entered into possession.

Amrutbai died in or about 1923 and the minor's uncle as next friend filed a suit, No. 4157 of 1924, in this Court to have it declared that the guardianship appointment was invalid and for its cancellation; for the cancellation of the anthority to sell and for a declaration that the sale did not bind the minor and for cancellation of the sale deed. Mr. Sanghani appeared in person and protested that the Court had no jurisdiction. He put forward other pleas as well but did not take any further part in the proceedings; and, in consequence, the Court made an ex parte decree which embodied the various reliefs prayed for in spite of the obvious defect in the plaint that the plaintiff was seeking equitable relief though, if his story were true, he should have sued for possession. Having succeeded in this Court the guardian proceeded to file a suit for possession in the Thana Court. Mr. Sanghani relied on his sale deed, and pleaded that the suit was barred by O. 2, R. 2; and that the High Court decree was a nullity since the land in suit was outside the town and island of Bombay. The Court however held that the defence was barred by the previous decree and refused to consider the case on

the merits. His appeal to the District Court was summarily dismissed.

Obviously the most important question we have to answer is that of jurisdiction, and the answer depends on whether a suit to cancel a sale deed of land is to be classed as a suit for land. It has been argued that the cause of action was fraud, and that this Court had jurisdiction to cancel both the order made by itself and the authority to sell which it had given inasmuch as the fraud was committed in Bombay within its walls. That argument would be unimpeachable were it not that Amrutbai's death had put an end to her guardianship and authority and there was no existing order under the Guardians and Wards Act to cancel.

What the plaintiff wanted was to undo what the lady had done on the strength of the appointment and authority, and we have to consider whether the suit to cancel the sale deed was or was not a suit for land. On this point we have been referred to the Full Bench case of *Hatimbhai Hasanally* v. *Framroz Eduljí* (7), and we need go no further. The actual decision was that a suit on a mortgage executed in Bombay of lands outside Bombay, was a suit to recover a debt and not for land, and it is not a direct authority. But the subject was exhaustively treated by all the Judges and the majority were of opinion that, in the words of Patkar, J., at p. 692 (*of* 51 *Bom*):

> "The words a 'suit for land' mean a suit in which the substantial question is the right to land or the primary object of which is to establish claims regarding title to or possession of immovable property."

Marten, C. J., held at p. 543 that a suit for a declaration and injunction "may in substance be a suit for land," and cited *Vaghoji* v. *Camaji* (13), a converse case to this; and *Sudamdih Coal Co Ltd.* v. *Empire Coal Co. Ltd.* (14), where it was held that the term "suit for land" extends to a suit for compensation for wrong to land where the substantial question is the right to the land. But apart from authority I am in full agreement with my learned brother. The decisive factor is the object of the litigation, and the real objection in this case was to recover the land. The cancellation of the document of sale, if necessary, was merely a means to that end. In consequence of this finding the appellant is entitled to defend the action on the merits and the case must go back. The discussion of the other points is academic and I shall refer to them only briefly. Mr. Thakor has no authority for his argument that a claim of the guardian of a minor can be time-barred, though the minor, who is given three years beyond the age of his attaining majority, is not barred. The point is concluded by *Moro Sadashiv* v. *Visaji Raghunath* (12) and *Norendra Nath Phari* v. *Bhupendra Narain Roy* (15). The learned counsel has relied also on O. 2, R. 2, and contends that even if the plaintiff had a choice of Courts, he should have chosen the one at Thana, which could have given him all his reliefs, and that when he chose to sue in Bombay he debarred himself from claiming the relief of possession and cannot now seek it in a separate suit. Mr. Coyajee replies that the minor had no cause of action to sue for possession so long as the sale deed was in his way but had first to have it cancelled. The point is of no importance now that we have held that this Court had no jurisdiction; but, with respect, I am of opinion that Mr. Thakor's view is the correct one. The minor could have asked for both cancellation and possession on the ground of fraud and trespass and that is a very unusual form of claim.

Lastly Mr. Coyajee has cited *Rajaram* v. *Central Bank of India* (6), but I agree with my learned brother that this decision does not prevent our deciding this case in favour of the appellant and remanding it for a hearing on the merits. The plaintiff Rajaram had mortgaged lands in Andheri and on a suit in this Court by the mortgagee Bank an order for sale was made. At the time the Court was justified by the ruling in *Yashvantrao Holkar* v. *Dadabhai* (16) in assuming jurisdiction. *Yashwantrao Holkar* v. *Dadabhai* (16) was upset by the Full Bench decision in *India Spinning and Weaving Co.* v. *Climax Industrial Syndicate* (17), which ruled that a suit by a mortgagee for sale was a suit for land. Rajaram therefore sued in this Court for a declaration that the decree against

13. (1904) 29 Bom 249=6 Bom L R 958.
14. (1915) 42 Cal 942=31 I C 581.
15. (1895) 23 Cal 374.
16. (1890) 14 Bom 353.
17. AIR 1926 Bom 1=91 I C 847=50 Bom 1 (F B).

him was a nullity. But Fawcett, J., decided against him and held that the Court passing the decree for sale was competent to deliver the judgment it did within the meaning of S. 44, Evidence Act, and had sufficient jurisdiction to bring the case within S. 11, Civil P. C. I need not refer to the reasoning of the learned Judge since it is obvious that the facts were materially different from those in our case. In effect Fawcett, J., was being asked to alter a decree of his own Court on the ground that it was wrongly decided. That he had no power to do. O. 20, R. 3, expressly prohibits a Judge from altering a judgment once signed except as provided by S. 152 or on review, and there was no mere clerical error to be corrected and no ground for review. It was not permissible for the plaintiff to avoid this express prohibition by filing a plaint instead of a review petition. Nor has a Judge power to hear an appeal against his own decision even if the appeal petition is disguised as a plaint. But here the Thana Court was not asked to alter a decree of the High Court. It was merely asked to ignore it on the ground that it was not a decree of a competent Court and S. 44, Evidence Act, and S. 11, Civil P. C., by implication empower Courts to ignore orders issued by Courts without authority. If the Thana Court was bound to accept the High Court decree the said sections are meaningless and useless.

V.B. *Decree reversed.*

A. I. R. 1933 Bombay 404

KANIA, J.

Alice Rice and *others*—Plaintiffs.

v.

S. N. Cama and *others*—Defendants.

Original Civil Suit No. 886 of 1930, Decided on 25th August 1932.

(a) **Trusts—Discretion of trustees to decide whether particular persons are entitled to the benefit of the trust or not is liable to be supervised by Court—Discretion exercised will not be interfered with unless it is not bona fide—Mere general allegation as to want of bona fides is not sufficient.**

Although the trustees have the power to decide whether particular persons are entitled to the benefit of the trust income or not, that discretion of the trustees is liable to be supervised and, if necessary, altered by the Court; but once the trustees have exercised the discretion and the exercise is within their power, unless it is shown that the exercise of the discretion was not bona fide or was perverse, the Court would not interfere with the exercise of that discretion. Indeed the Court would be slow to interfere with the discretion of the trustees, when the settlor has given them absolute discretion, unless a very strong prima facie case is made out. So long as the trustees have not untilised the money for their own personal use but have paid the same to persons whom they consider in their judgment to be proper persons to receive the bounty, it is not on a mere general allegation of want of bona fides open to Court to assume jurisdiction to inquire into the action of the trustees. It is the duty of the plaintiff to put before the Court the various facts on which he relies for showing how the act of the trustees was not bona fide. *In re Reven* (1915) 1 *Ch.* 673, *In re Burrage* (1890), 62 *L. T.* 752, *Rel. on.* [P 406 C 1,2]

(b) **Trusts—Construction—Duty of Court is to see whether words used show intention of parties.**

Even if the parties wanted to make provision for a certain thing, it is the duty of the Court only to see whether in fact the words used show that that intention has been carried out. [P 407 C 1]

Lalji Gokaldas and *B. G. Paranjpe*—for Plaintiffs.

Jamshed Kanga and *D. N. Bahadurji*—for Defendants.

Judgment.—This suit is filed by two daughters and a son of one Hormusji Edulji Cama, who became a convert to Christianity and adopted the name of William Edward Rice, to recover from the defendants, who are the present trustees of the trust deed made by Hormusji Muncherji Cama on 23rd January 1872, maintenance and other allowance as provided in the first declaration of Cl. 2 of the trust deed. It is alleged in the plaint that the plaintiffs are the descendants of Hormusji Muncherji Cama. The father of the plaintiffs during his lifetime was working as a preventive officer in the Customs department on a monthly salary of Rs. 600. While he was alive the trustees had paid a sum of Rs. 50 per month to one Mercy Rice, the eldest daughter of Hormusji Edulji Cama. It is alleged in the plaint that Hormusji died on 7th July 1929 without leaving any substantial assets. It is further alleged that the three plaintiffs are being educated at Barnes High School, Deolali, and they have not got the proper or necessary means for their education. In para. 11 of the plaint it is alleged that the plaintiffs are the members of the family of the said Hormusji Muncherji Cama and are in poor, distressed and indigent circumstances. It is further alleged that the plaintiffs are the proper persons to be recipients of the support

and relief directed to be extended to or conferred upon them by the said declaration in the trust deed. It is further alleged that the defendants are aware of the plaintiffs' circumstances. In paras. 12 and 13 of the plaint it is alleged that although applications were made to the trustees for a grant of an allowance to the plaintiffs they have refused to do so. Para. 14 of the plaint then runs as follows :

"The plaintiffs further say that in any event the decision of the defendants declining to render any assistance to the plaintiffs out of the said trust fund, is quite unfair and unreasonable and is not bona fide."

The defendants have filed a written statement in which they deny that the plaintiffs are proper persons to receive the allowances under the trust deed from them. They further say that they have made all proper inquiries and in their opinion the plaintiffs are not entitled to receive anything from the trust funds. They further contend that they having exercised the discretion which was given to them under the trust deed the Court has no power to question their exercise of the discretion. In the alternative it is contended that the deceased Hormusji Edulji Cama having become a convert to Christianity the plaintiffs are not members of the family of the deceased Hormusji Muncherji Cama within the meaning of the first declaration of the second clause of the trust deed. On a summons taken out for further and better affidavit of documents the learned Chamber Judge directed the following two issues to be tried, in Court, as preliminary issues : 1. Whether the plaintiffs, under the circumstances set out in the plaint, are entitled to challenge the decision of the trustees of the trust deed mentioned in the plaint upon a true and proper construction of the trust deed ? 2. Whether upon a true and proper construction of the trust deed the plaintiffs are beneficiaries thereunder at all ?

The trust deed Ex. A mentions the property which is settled on trust and then in the first clause provides for the creation. of the "Hormusji Muncherji Cama Charity Fund" and the collection of the interest on the Government Paper settled on trust. Cls. 2 and 16 of the said trust deed, which are material for the purpose of determination of the issues, run as under ;

"2. And it is hereby agreed and declared that, the said Trustees or Trustee shall divide the same dividends into five equal portions, four of which equal parts shall yearly be paid, applied or expended, in the discretion of the said Trustees or Trustee, in and upon the four charitable purposes next hereinafter set forth, it being hereby distinctly provided and declared that, in such yearly payment, application and expenditure, the said Trustees or Trustee, for the time being, shall give a preference to the objects of charity coming within the first of the four declarations of charitable purposes hereinafter set forth, to those coming within the second, third and fourth of such declarations, and in like manner shall give preference to the objects coming within the second of such declarations to those coming within the third and fourth of such declarations and in like manner shall give a preference to the objects coming within the third of such declarations to those coming within the fourth of such declarations.

First declaration. The support, maintenance assistance or relief of such members of the family of the said Hormusji Muncherji Cama as may be in poverty, distress or indigent circumstances ; due inquiries as to the circumstances and deserts of the respective recipients being made by the said Trustees or Trustee who shall satisfy themselves or himself that the intended recipients respectively are members of such family and proper persons to be recipients of the support or relief hereby directed to be extended to or conferred upon them, with power for the said Trustees or Trustee, at their discretion to discontinue any allowance which shall, have been made by them or him, under or by virtue of the terms of these presents, to any person or persons whomsoever, whenever it shall appear to the Trustees or Trustee, fit and proper so to do.

Second declaration. The support, maintenance assistance or relief of such Parsee members of the family, commonly known in India as 'Camajee Cooverjee's Family,' as may happen to be in poverty, distress or indigent circumstances; such inquiries being previously made by such Trustees or Trustee, as is hereinbefore directed with reference to the members of the said family of Hormusjee Muncherjee Cama.

Third declaration.—The support, maintenance and and assistance or relief of such followers of the Zoroastrian creed as may be in poverty in distress or in indigent circumstances, after making due inquiries as aforesaid.

Fourth Declaration.— The furtherance and support of religious charitable or benevolent schemes, objects or purposes, in the discretion of the Trustees or Trustee, for the time being, preference being given, in the exercise of such discretion, to the maintenance of the three Dhurumshalas, situate respectively at Nowsaree, Big Damaun, and Small Damaun, established and dedicated to charitable purposes by Ruttonbai, the late widow of the late Hormusjee Muncherjee Cama, and the mother of the said Pestonjee Hormusjee Cama, and Dossabhoy Hormusjee Cama, parties hereto, in the Christian year one thousand eight hundred and forty-five.

16. And lastly, in order that fit 'and eligible persons may, at all times hereafter, be found willing to take upon themselves the burden of the execution of the trusts hereby created and declared, and that, in so doing, the minds of all such persons may be fully satisfied and assured,

it is hereby declared that the acts and deeds of all trustee of these presents in the execution of the trusts hereby in them reposed, shall be favourably and liberally regarded and construed by all Courts, Judges, functionaries, and persons whatsoever, and whomsoever, it being the wish and desire of the said parties hereto of the first part, and the true intent and meaning of these presents, that the said trustees shall only be bound and required to act, in the execution of the aforesaid trusts, in such manner as may appear to them, to the best of their judgment, calculated to carry out and perform the said trusts, and in conformity therewith, effectually to promote the several schemes, objects and purposes, hereinbefore specified or referred to."

It is contended that although the trustees have the power to decide whether particular persons are entitled to the benefit of the trust income or not that discretion of the trustees is liable to be supervised and, if necessary altered by the Court. As a general proposition I do not think this statement can be disputed. I do not think that if the clause in the trust deed is worded as recited above or if it is recited in stronger language which makes the decision of the trustee final or even if words are used in the trust deed which would expressly oust the jurisdiction of the Court to question the discretion of the trustees, the Court's jurisdiction cannot be ousted. According to the decision in *Raven, In re: Spencer* v. *National Association for the Prevention of Consumption and other forms of Tuberculosis* (1) such a direction would be void and inoperative on the ground of repugnancy and as being contrary to public policy. It is, however, equally clear that once the trustees have exercised the discretion and the exercise is within their power, unless it is shown that the exercise of the discretion was not bona fide or was perverse, the Court would not interfere with the exercise of of that discretion. Indeed the Court would be slow to interfere with the discretion of the trustees, when the settlor has given them absolute discretion, unless a very strong prima facie case is made out. As an illustration of the Court not being inclined to interfere with the discretion, when bona fide exercised, the case of *Re Burrage: Burningham* v. *Burrage* (2) is an authority. In the present case the effect of the plaint is that according to the plaintiffs they are members of the family of the deceased Hormusjee Muncherjee Cama and they are in poor, distressed and indigent circumstances. According to them they are proper objects of maintenance and support within the meaning of the first declaration of Cl. 2. They further allege that they have not been paid any allowance under the trust deed. These are the only allegations contained in the plaint on which the contention contained in para 14 of the plaint can be based. In that paragraph it is alleged that the decision of the trustees is unfair, unreasonable and not bona fide.

The first two grounds are not available to the plaintiffs because once the trustees have decided the matter after making such inquiries as they consider proper, it is not for the Court to decide whether the decision was unfair or unreasonable, having regard to the wide powers given to the trustees. The mere allegation in para. 14 of the plaint that the decision was not bona fide does not, in my opinion, help the plaintiffs. The allegation that a certain act is not bona fide is an inference to be deduced from the facts alleged by the plaintiffs. For the inference that the act in question is not bona fide the plaintiffs have to give particulars as to what actions and for what reasons they say that the trustees' act is not bona fide. On looking at the previous paragraphs it is found that the averments only show that they being proper objects, according to the plaintiffs, have not been paid any allowance and that is the only ground for alleging that the decision of the trustees was not bona fide. I do not think that having regard to the powers given to the trustees to satisfy themselves that the intended recipients were members of such family and proper persons to be recipients of the support or relief by the trust deed directed to be extended to or conferred upon them, the mere allegation that the decision of the trustees is not bona fide is sufficient to give the Court jurisdiction to inquire into the decision of the trustees. It was the duty of the plaintiffs, in a case like this, to put before the Court the various facts on which they rely for showing how the act of the trustees was not bona fide. By merely alleging that although they are the proper objects of the bounty of the settlor the trustees have not paid

1. (1915) 1 Ch. 673=84 L J Ch 489=113 L T 131.
2. (1890) 62 L T 752.

them anything, the plaintiffs do not establish the case of want of bona fides. It is common ground that in cases of this kind there may be various claimants to the trust income which is available for distribution by the trustees. So long as the trustees have not utilized the money for their own personal use but have paid the same to persons whom they consider in their judgment to be proper persons to receive the bounty, it is not on a mere general allegation of want of bona fides open to Court to assume jurisdiction to inquire into the action of the trustees. I therefore think that having regard to the allegations in this plaint the first issue should be found in the negative.

The second issue, which having regard to my finding on the first issue it is not necessary for me to decide may if necessary, be decided in favour of the plaintiffs. In my opinion the wording of the first declaration of Cl. 2 is not restricted to the Parsee members of the settlor's family. The words used in declaration (2) of the same clause clearly indicate that when the settlor wanted to indicate the Parsee members of his family he used the proper expression in that place. It is contended on behalf of the defendants that the whole scheme of the trust deed is to benefit persons belonging to the Zoroastrian faith and to no others. Looking to the whole trust deed I feel that there is considerable force in that contention. At the same time it must be remembered that even if the parties wanted to make provision for a certain thing, it is the duty of the Court only to see whether in fact the words used show that that intention has been carried out. The first declaration is perfectly general in its terms and allows the trustees to pay money to members of the settlor's family. In that clause there is no suggestion whatsoever which can lead me to infer that the benefit was to be restricted to the members professing the Zoroastrian faith. In the absence of any words in the first declaration to that effect I am not able to accept the contention of the defendants in this respect because if I accept that contention it would mean that I should be reading the word "Parsee" before the words "members of the family" in that declaration. I do not think any authority justifies any such addition. The second issue should, if necessary, be found in the affirmative.

K.S. *Order accordingly.*

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* A. I. R. 1933 Bombay 407

WADIA, J.

Vallibhai Adamji, In re

Insolvency No. 623 of 1932, Decided on 27th January 1933.

*** (a) Contract Act (1872), S. 43—S. 43 applies to partners—Judgment against one partner is no bar to subsequent suit against other partners, so long as debt is not extinguished—Civil P. C. (1908), S. 11.**

Section 43 applies as much to partners as to other co-contractors. A judgment against one partner is no bar to a subsequent suit on the contract or obligation against the other partners, so long as the debt is not extinguished, as the liability of partners is a joint and several one: *Case law referred.* [P 408 C 2, P 409 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 13—Decree obtained against one partner only—After knowledge of existence of other partner he was proceeded against under insolvency law on same debt—Held if debt be partnership debt it is sufficient to support adjudication of both partners.

The petitioning creditor had filed a suit against the son of the applicant individually and obtained a decree; but he afterwards learnt that the applicant was also a partner with his son and proceeded against him under insolvency law on the same debt. In a notice of motion taken out by the applicant to set aside the adjudication order passed against him it was contended that on account of the decree obtained against his son as a partner there was no debt due and payable by him and that it was not competent to the petitioning creditor to get him adjudicated:

Held: that though the remedy to sue may be barred by the law of limitation yet the debt was not extinguished. If therefore it was proved that the debt in dispute was a partnership debt, its existence would suffice to support an adjudication order against both the father and son. [P 409 C 1]

C. K. Daphtary—for Applicant.

P. B. Vachha—for Petitioning Creditors.

Order.—This is a notice of motion taken out by the applicant Vallibhai Adamji to set aside the adjudication order made on 7th November 1932, adjudicating him and his son Salebhai Vallibhai, both described as

"lately carrying on business in partnership at Taher Building, Koliwada, Mandvi, Bombay, in the name and style of Salebhai Vallibhai and at Saddar Bazaar, Bilaspur, in the name and style of Adamji Kadibhai."

The petitioning creditors had filed a suit on the Original Side of this Court, being Suit No. 1107 of 1932, against the son, Salebhai Vallibhai, individually, and a decree was passed against him alone for Rs. 3,326-7-0 on 10th August

1932. The applicant therefore contends that there is no debt due and payable by him, and that under S. 13 (1) and (4), Presidency Towns Insolvency Act it was not competent to the petitioning creditors to get him adjudicated. The petitioning creditors say that they only subsequently learnt that the applicant was a partner with his son, and they further say that they have sufficient evidence to establish the partnership. The applicant's answer is that even assuming that he was a partner, which he denies, the debt due by the firm was merged in the decree obtained by the petitioning creditors against Salebhai, and no debt survives as against him to sustain an adjudication order.

Under the English Common law the liability of partners is considered to be joint, and if a creditor of a firm obtains judgment in an action brought against only one of its partners, he loses his remedy against the other partner or partners when he recovers judgment, even though that judgment remains unsatisfied. The cause of action being single cannot afterwards be divided into two or more: see Lindley on Partnership, Edn. 9, p. 328. This principle was laid down by Parke, B., in *King* v. *Hoare* (1) in which case goods were sold and delivered to the defendant jointly with another and were to be paid for by the defendant jointly with the other. It was held that a judgment against one of the two joint debtors, even though it was not satisfied, was a bar to an action against the other. This rule was held not to apply in the case of a joint and several contract: it was said that a joint and several bond comprised the joint bond of all and the several bonds of each of the obligors, and gave different remedies to the obligee. The rule in *King* v. *Hoare* (1) was adopted by the majority of the House of Lords in *Kendall* v. *Hamilton* (2) Lord Penzance alone dissenting. S. 43, Contract Act, however makes the liability on all contracts joint and several, and allows promisee to sue one or more of the several joint promisors as he chooses, and excludes the right of any one of them to be sued along with his co-promisor or co-promisors. It was pointed out in *Lukmidas Khimji* v. *Purshotam Haridas* (3) that this section was

> "one of the series of sections materially altering the rules of English Common law as to the devolution of the benefit of and liability on joint contracts, the English rule corresponding to S. 43 being that 'all joint contractors must be sued jointly for a breach of contract'."

There is a difference between a joint liability and a joint and several liability. In the case of a joint promise the obligation is single and entire and is extinguished by a judgment and decree in a suit against any one of the joint promisors. In the case of a joint and several promise the position is different. The creditor in that case has as many joint causes of action as there are co-promisors, and can bring as many actions as there are co-promisors. It is clear however that in no case can a creditor recover more than what is due to him. It has been held in the case of *Lukmidas Khimji* v. *Purshotam Haridas* (3) which was followed by the appeal Court in *Motilal Bechardass* v. *Ghellabhai Hariram* (4) that S. 43, Contract Act, applies as much to partners as to other co-contractors. In a later judgment in *Lukshmishankar* v. *Vishnuram* (5) Candy, J., observed at p. 84 that joint liability was the ordinary incident of a partnership and that no one partner could change it into joint and several liability without the consent of the other partners. This decision has no reference to S. 43, and the learned Judge had evidently the English Common law rule in his mind when he spoke of the liability of partners as joint. The section does apply also in the case of partners, and, as Farran, J., pointed out (p. 11) in *Motilal* v. *Ghellabhai* (4) the legislature would have said so in express words, if it had intended to except partners from the provisions of the section.

There is however a difference of opinion among the different High Courts in India as to the effect of a decree obtained against one co-promisor only on the promisee's right to proceed by a separate suit against the other co-promisor or co promisors. The earlier decisions in Calcutta and Madras adopted the rule in *King* v. *Hoare* (1) and held that a decree against one was a bar to a subsequent suit against the other or others. It was said that the *debt transit in rem*

1. (1844) 13 M & W 494=2 D & L 382=14 L J Ex 29.
2. (1879) 4 A C 504=48 L J C P 705=28 W R 97=41 L T 418.
3. (1882) 6 Bom 700.
4. (1893) 17 Bom 6.
5. (1899) 24 Bom 77=1 Bom L R 534.

judicatam. The appeal Court of Allahabad held differently in *Muhammad Askari* v. *Radhe Ram Singh* (6). According to that decision where the obligation was not joint but joint and several, the doctrine that a joint debt was merged in a judgment against one debtor did not apply, and if such a judgment remained unsatisfied, it was not a bar to a suit against the others. Macleod, J., (as he then was) held differently in *Shivlal Motilal* v. *Birdichand Jivraj* (7) and his decision was followed by Kajiji, J., in *Markandrai* v. *Virendrarai* (8). The earlier Madras decision has however not been followed in the later decisions of that Court : see *Ramanjulu Naidu* v. *Aravamudu Aiyangar* (9) and *Mool Chand* v. *Alwar Chetty* (10). It appears to me that there can be no res judicata upon a cause of action against a co-promisor, when it has never been before the Court, as his liability is joint and several. There can therefore be no merger when a cause of action against the co-promisor has not been sued upon. The result is that a judgment against one joint and several promisor is no bar to a subsequent suit on the contract or obligation against the other or others.

The correctness of the decision of Macleod, J., in *Shivlal Motilal* v. *Birdichand Jivraj* (7) is disputed by Messrs. Pollock and Mulla in their commentaries on S. 43, Contract Act. But even assuming that that decision is binding upon me, and that a subsequent suit is not competent to the promisee after recovering judgment against one of the co-promisors, it is only the remedy of the promisee by a separate and subsequent suit that is barred by reason of the supposed merger of the debt in the decree. The debt however is not extinguished nor wiped out, just as it is not extinguished, though the remedy to sue in respect thereof may be barred by the law of limitation. If therefore it is proved that the debt in dispute is a partnership debt, its existence will suffice to support an adjudication order against both the father and the son. As the factum of the partnership is denied, I cannot dismiss the notice of motion. I therefore direct that the issue, whether the applicant was a partner with his son at all material times, be tried in this Court, and order it to be set down for hearing on 21st February next. Costs of the notice of motion will be costs in the issue.

K.S. *Order accordingly.*

6. (1900) 22 All 307=1900 A W N 73.
7. (1917) 40 I C 194.
8. (1917) 42 I C 815.
9. (1909) 33 Mad 317=5 I C 735.
10. (1916) 39 Mad 548=29 I C 303.

A. I. R. 1933 Bombay 409

BAKER AND BROOMFIELD, JJ.

Krishnarao Ramchandra—Petitioner In re.

Criminal Revn. Appln. No. 74 of 1933, Decided on 17th May 1933, from order of Dist. Magistrate, Kanara, D/- 17th December 1932.

(a) Bombay Special (Emergency) Powers Act (16 of 1932), S. 29—Proceedings under Act—High Court has jurisdiction to interfere notwithstanding S. 29 if considerations of justice require it — Government of India Act (1915), S. 107.

The rights of superintendence which the High Court possess under S. 107, Government of India Act, 1915, include not only superintendence on administrative points, but superintendence on the judicial side too. Under its power of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction. The special Courts under the Emergency Powers Ordinance, 1932, fall within the purview of the superintendence of the High Court. The High Court has a discretion to revise or set aside any conviction under its power of superintendence, but it should exercise its discretion on judicial grounds, and only interfere if considerations of justice require it to do so. Hence S. 29, Emergency Powers Act, is no bar to the High Court's entertaining a petition for quashing of proceedings taken under the Act: *A I R* 1933 *Bom* 1 (*S B*), *Rel. on.* [P 410 C 2; P 411 C 1]

(b) Bombay Special (Emergency) Powers Act (16 of 1932)—It is doubtful whether Act applies to person residing in foreign territory.

As Act 16 of 1932 applies only to the Bombay Presidency, it is extremely doubtful whether it can be made to apply to a person who is not a resident in the Bombay Presidency, and not even in British India but resides in foreign territory. [P 411 C 1]

(c) Bombay Special (Emergency) Powers Act (16 of 1932), Ss. 4 and 14—Valid order under S. 4 is necessary for offence under S. 14.

In order that there should be an offence under S. 14 it is necessary that there should be a valid order under S. 4. [P 411 C 1]

(d) Criminal P. C. (1898), S. 439—High Court will quash even proceedings of interlocutory nature where no offence has been committed.

The High Court will interfere and quash proceedings even though they are of an interlocutory nature in cases where it is clear that interference is necessary where no offence has obviously been committed : *A I R* 1928 *Bom* 184, *Ref.* [P 411 C 2]

Y. N. Nadkarni, *K. V. Joshi* for *D. R. Manerikar* and *R. A. Jahagirdar*—for Petitioner.

B. G. Rao—for the Crown.

Baker, J.—This is an application by one Krishnarao Ramchandra Haldipur of Karwar for revision of the order passed by the District Magistrate, Kanara, on 17th December 1932, under S. 4 (1) of the Special Powers Ordinance 10 of 1932 directing his brother Subrao Ramchandra Haldipur to report himself daily at 9 a. m. and 7 p. m. to the Police Sub-Inspector of Karwar, for one month from the date of the order, the same order having been directed to remain in force until further orders by the Government of Bombay, dated 28th December 1932, and praying that the said orders be set aside and the proceedings taken against his brother Subrao under Ss. 87 and 88, Criminal P. C., may be quashed and for an interim stay of the criminal proceedings pending disposal of this application.

The facts of this application, which are somewhat unusual, are that the petitioner's brother Subrao Ramchandra Haldipur was convicted under the Ordinance in January 1932 and sentenced to one year's rigorous imprisonment and was released from the Ratnagiri prison on 17th December 1932. Subrao was a resident of Karwar. But it appears that he went straight from Ratnagiri to Goa, which is foreign territory, and has ever since remained there outside the Bombay Presidency. On 17th December 1932, the order in question directing him to report himself twice a day to the police at Karwar was issued by the District Magistrate of Kanara under S. 4 (1), Special Powers Ordinance 10 of 1932. That order was never served on Subrao, who was in Goa, but it was served on 7th January 1933, on the petitioner, his brother, who is a resident of Karwar. Thereafter another order dated 5th January 1933 was issued by the District Magistrate, Kanara, extending the period of the previous order dated 17th December 1932, until further orders. This order was similarly served on the petitioner on behalf of his brother, against whom the order was directed, and subsequently by Act 16 of 1932, the Bombay Special (Emergency) Powers Act, the order was extended by the Governor-in-Council under S. 4 (1), emergency Act. Owing to the absence of Subrao in Goa it was not practicable to serve the order upon him and a charge-sheet was preferred by the Karwar police against Subrao, a copy of which is annexed to the petition, a translation of the original charge-sheet. In that charge-sheet it is stated that the offence is one under S. 14, Bombay Act, 16 of 1932 by reason of Subrao staying away and concealing himself to avoid service in foreign territory, and it was prayed that a warrant should be issued against the accused under S. 87, Criminal P.C., and a proclamation also should issue and steps be taken under S. 88, Criminal P. C. A warrant of arrest was issued by the First Class Magistrate of Karwar against the petitioner's brother Subrao on 25th February 1933, followed by a proclamation. The petitioner applies for the quashing of these proceedings as being without jurisdiction.

A preliminary objection has been taken by the Government Pleader that under S. 29, Bombay Special (Emergency) Powers Act, 16 of 1932, the proceedings taken under the Act cannot be called in question by any Court except as provided in the Act and therefore the jurisdiction of this Court is excluded. It is not necessary to go into the question as to whether an Act of the Provincial Legislature could in any way limit the powers of the High Court. It is sufficient to say that it has been held recently in a Special Bench case of this Court, *Emperor* v. *Balkrishna Phansalkar* (1) that :

"The power of superintendence which the High Court enjoys over all Courts for the time being subject to appellate jurisdiction, under S. 107, Government of India Act, cannot be controlled by the Governor-General either under S. 71 or S. 72 of the Act, by virtue of S. 65 and Sch. 5 of the Act. The rights of superintendence which the High Court possesses under S. 107, Government of India Act 1915, include not only superintendence on administrative points, but superintendence on the judicial side too. Under its power of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction. The Special Courts under the Emergency Powers Ordinance, 1932, fall within the purview of the superintendence of the High Court, since they are subject to the appellate jurisdiction of the High Court, which has the power to hear appeals in certain cases under S. 39 of the Ordinance. The exercise of the power of superintendence under S. 107, Government of India Act, is not the same thing as the hearing of an appeal

1. A I R 1933 Bom. 1=1933 Cr C 1=141 I C 720=34 Cr L J 199=57 Bom 93 (SB).

The High Court has a discretion to revise or set aside any conviction under its power of superintendence, but it should exercise its discretion on judicial grounds, and only interfere if considerations of justice require it to do so"

There can therefore be no doubt as to this Court's jurisdiction to interfere in such matters, and this is a sufficient answer to the objection under S. 29 of the Act. Turning to the facts the present case is one of a peculiar nature. The person against whom the proceedings are taken is not a resident of the Bombay Presidency. By virtue of the provisions of S. 31, Bombay Act 16 of 1932, anything done or deemed to have been done in pursuance of any provision of the Special Powers Ordinance of 1932, shall, where the corresponding provisions of this Act have come into operation before the expiry of the said Ordinance, be deemed to have been done in pursuance of the corresponding provision of this Act and shall have effect, and the provisions of this Act shall have effect accordingly. Since the proceedings must be regarded as being taken under Act 16 of 1932, an Act which applies only to the Bombay Presidency, it is extremely doubtful whether it can be made to apply to a person who is not a resident in the Bombay Presidency, and not even in British India, but resides in foreign territory. But apart from this it will be observed that the chargesheet refers to the petitioner's brother Subrao as having committed an offence under S. 14 of the Act, which refers to disobedience of an order made under S. 4. In order that there should be an offence under S. 14 it is necessary that there should be a valid order under S. 4.

Now, quite apart from the question whether an order under S. 4 could validly be made against a person who is not a resident in this Presidency and therefore not subject to the provisions of this Act, S. 4 (3) requires that an order made under sub-S. (1) shall be served on the person to whom it relates in the manner provided in the Code for service of a summons. The manner provided in the Code for service of a summons is in S. 69, Criminal P. C., which contemplates a personal service or where a person summoned cannot be found under S. 70, the summons may be served by leaving one of the duplicates with some adult male member of his family. But a reference to the charge will show that the whole of the proceedings are based on the assumption that the accused Subrao is avoiding service of the summons by concealing himself in foreign territory. It follows therefore that the prosecution themselves base their application to the Magistrate on the ground that there has been no service of the summons. If therefore there has been no service of the summons, that is of the order under S. 4, there has been no valid order under S. 4 of the Act, because it has not been served upon the person affected by it and inasmuch as there has not been valid service there can be no disobedience of the order under S. 14.

The result is that the whole basis on which the present proceedings are taken falls to the ground and the proceedings under Ss. 87 and 88, Criminal P. C., are invalid and should be quashed. Although these proceedings are of an interlocutory nature the High Court will interfere to quash proceedings in cases where it is clear that interference is necessary where no offence has obviously been committed: *In re Kuppuswami Aiyar* (2) and *In re Shripad Chandavarkar* (3). For these reasons I am of opinion that the proceedings before the First Class Magistrate of Karwar should be quashed as being without jurisdiction.

Broomfield, J.—I agree with my learned brother. There could obviously be no offence under S. 14 of the Act unless there was firstly, a valid order, and secondly, a valid service of the order upon the person against whom it was directed. No order could be made either under the Act or under the Ordinance which was superseded by the Act which would bind a person outside the Bombay Presidency, or at any rate, the operation of any such order would be postponed until the person in question comes within the jurisdiction. It may be a legitimate interpretation of the rulings in the Special Bench case of *Emperor* v. *Balkrishna Phansalkar* (1) and *Emperor* v. *Gulabchand* (4), that the District Magistrate of Kanara would have power to make an order regulating the movements of a resident of that Dis-

2. (1916) 39 Mad 561=29 I C 109=16 Cr L J 477.
3. A I R 1928 Bom 184=108 I C 27=29 Cr L J 317=52 Bom 151.
4. A I R 1933 Bom 148=1933 Cr C 460=143 I C 622.

trict in the event of his returning to it, or even to make an order directing him to return to the Kanara District and to regulate his movements as directed, provided the said person was within the limits of the Bombay Presidency at the time the order was made. But it cannot be held, in my opinion, that the District Magistrate has any power to make an order directing a person not at the time being a resident of the Bombay Presidency to return to it. When the applicant in this case was released he was apparently released without any condition, and he was fully entitled to go to Goa either for medical reasons, as he says, or for any other reason.

Even if the order was valid it could not be operative until it was validly served. In my opinion there was no valid service under Ss. 69 and 70, Criminal P. C. It was not impracticable to serve the applicant with the order except in the sense that the Criminal Procedure Code is not applicable to foreign territory. But S. 70, Criminal P. C., cannot have been intended to make it indirectly applicable outside the jurisdiction. Anyhow as my learned brother has pointed out, the nature of the charge made against the applicant and the evidence recorded by the Magistrate show that the prosecution case was that there was no service of the order on the person against whom it was made.

As to the objection taken by the learned Government Pleader under S. 29 of the Act, I have nothing to add to what my learned brother has said.

K.S. *Proceedings quashed.*

A. I. R. 1933 Bombay 412

MURPHY AND WADIA, JJ.

Akbaralli Haji Mahmadalli--Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 20 of 1933, Decided on 27th June 1933, from order of Sess. Judge, Broach.

Railways Act (1890), Ss. 112 and 114—Season ticket in name of one used by another—Absence of consent by former not contended—Former is guilty of abetment.

A season ticket issued in the name of one person was found to be used by his brother. It was not contended by the former that the latter had taken the ticket without his consent or knowledge.

Held: that it must be presumed that the former had given the ticket to the latter for use, and that his conduct amounted to an abetment of an offence under S. 112, committed by the latter. [P 413 C 1]

G. B. Titi—for Accused.

B. G. Rao—for the Crown.

Wadia, J.—This is a reference made to us by the Sessions Judge of Broach and the Panch-Mahals for setting aside the conviction of one Akbarali Haji Mahmadalli who was convicted by the First Class Magistrate, Godhra, of an offence under S. 114, Railways Act, and sentenced to a fine of Rs. 20.

One Kalimuddin Haji Mahmadalli, a brother of Akbaralli, was found travelling from Piplod to Godhra on 26th June 1932, with a monthly ticket No. 96. It has been found that the ticket had been issued to Akbaralli. The Ticket Collector at Godhra asked Kalimuddin to pay the fare from Piplod to Godhra and a penalty of Re. 1 on the ground that the monthly ticket which he produced was in his brother's name and could not be used by him. He failed to do so. On these facts both Kalimuddin and Akbaralli were prosecuted, Kalimuddin under S. 112, Railways Act, for travelling without a proper ticket, and Akbaralli under S. 114, for having parted with his monthly ticket to Kalimudddin to enable him to travel with it.

A revisional application was filed before the learned Sessions Judge against this conviction by both Kalimuddin and Akbaralli. The learned Judge found that the offence under S. 112, Railways Act, had been satisfactorily proved against Kalimuddin and dismissed the application so far as it related to Kalimuddin. He was however of opinion that no offence under S. 114, had been established against Akbaralli. In his view a monthly ticket was not covered by the words "any half of a return ticket" used in S. 114. He was also of opinion that it had not been established that Akbaralli was privy to the use which Kalimuddin had made of the monthly ticket.

The question whether a monthly ticket can be held to be covered by the words "any half of a return ticket" used in S. 114 is not, in our opinion, free from doubt. We think however that Akbaralli's conduct clearly amounts to abetment of the offence under S. 112 Railways Act, which was committed by his brother Kalimuddin. It is in evidence that the monthly ticket was in the name of Akbaralli. Akbaralli's own

defence before the Magistrate was clearly based on the assumption that the ticket had been issued to him and that he was the person entitled to use it. It has been found in the lower Court that it was Kalimuddin who was travelling with the ticket and it must therefore be presumed that it was Akbaralli who gave the ticket to Kalimuddin to use. It was not contended by Akbaralli in the lower Court that Kalimuddin had taken his ticket without his consent or knowledge. On this view of the case Akbaralli must be held to have abetted the offence which was committed by Kalimuddin. We see no reason for interfering with the conviction beyond directing that the conviction should be under S. 112, Railways Act, read with S. 114, I. P. C.

K.S. *Order accordingly.*

A. I. R. 1933 Bombay 413

BAKER AND SHINGNE, JJ.

Sayamma Dattatraya Narsingrao — Appellant.

v.

Punamchand Raichand Marwadi — Respondent.

First Appeal No. 120 of 1930, Decided on 5th April 1933, from decision of First Class Sub-Judge, Poona, in C. S. No. 292 of 1929.

(a) Appeal—Point of law can be taken for first time in appeal—Practice.

A p int of law can be taken for the first time in appeal even though it has not been taken in the written statement. [P 413 C 2]

(b) Criminal P. C. (1898), S. 345—Compounding of compoundable offence—Subsequent suit for damages on facts constituting original offence does not lie.

The effect of the compounding of an offence which is compoundable, apart from the acquittal of the accused, would be that a suit for damages on the facts constituting the original offence would not lie: 20 *I C* 618, *Ref.* [P 414 C 1]

(c) Contract Act (1872), S. 23—Prosecution for offence under S. 406, I. P. C.—Withdrawal from prosecution in consideration of promissory note—Consideration of promissory note is bad.

The plaintiff charged D-1 with offence under S. 406, Penal Code (criminal breach of trust). During the pendency of the complaint the matter was settled by D-1, D-2 and D-3, passing two promissory notes of Rs. 7,500. The prosecution was withdrawn a day prior to the execution of the promissory notes. The plaintiff sued on these promissory notes:

Held: that the consideration for the promissory notes in the present case being the compounding of a non-compoundable criminal charge, the agreement was void in law and that the suit should be dismissed as against D-2 and D-3: *Case law referred.* [P 414 C 2; P 416 C 2]

Principles deducible from decided cases on law of stifling prosecution enunciated by Shingne, J. [P 416 C 1]

M. R. Jayakar, K. R. Padhye and *Solomon Moses*—for Appellant.

G. N. Thakor and *P. B. Gajendragadkar*—for Respondent.

Baker, J.—The plaintiff had taken in pledge certain ornaments from defendant 1. Defendant 1 asked for the loan of the ornaments for a festive occasion, promising to return them within a few days. The plaintiff allowed him to take them, but defendant 1 did not return them, and disposed of them elsewhere. Thereupon the plaintiff charged him with offences under S. 406, I. P. C., criminal breach of trust, and S. 420, I. P. C., cheating. During the pendency of the complaint the matter was settled by defendant 1, his brother-in-law defendant 2, and defendant 3 who is a sister of defendant 2, passing two promissory notes of Rs. 7,500. The plaintiff sued on these promissory notes, and the First Class Subordinate Judge of Poona has given him a decree. Defendant 3 has appealed, and the principal ground taken in appeal is that the consideration for the notes being the withdrawal of the complaint, is against the provisions of S. 23, Contract Act, and therefore no suit can lie.

Before dealing with this point, I may briefly refer to the argument of the learned counsel for the respondent that this point was not taken in the written statement, the contention being that the plaintiff represented to the defendants that the promissory notes were hollow, and would not be acted upon. This is an argument which has now been given up, but the contention that the consideration was against the law will be found in paras. 4, 5 and 6 of the written statement. Even if it were not so, it is a point of law, and can therefore be taken in appeal.

A number of cases have been quoted on both sides, but before considering them, it would be necessary to have an accurate statement of the facts. The fact that the criminal proceedings terminated the day before the promissory notes were executed makes no difference, as there can be no doubt that the withdrawal of the criminal proceedings was due to the fact that the defendants had agreed to pass the promissory notes. A distinction must also be drawn between the position of defendant 1, who has not

appealed, and defendants 2 and 3, of whom only defendant 3 has appealed. Defendant 1 had pledged the ornaments for Rs. 7,000 with plaintiff and therefore as he had got back the ornaments without paying the amount, he is undoubtedly liable to pay the amount with interest to plaintiff. Defendants 2 and 3, who are the brother and sister of defendant 1's wife, are in no way liable for the amount which defendant 1 owes to the plaintiff, and this will distinguish the case from any case in which persons passing the bond or document were themselves liable for the original claim. As nothing was admittedly paid by the plaintiff, the consideration for the promissory notes is clearly the withdrawal of the prosecution, and this is made clear by the statement of the plaintiff himself at p. 10, where he says:

"I did not say that the promissory notes were to be hollow. I said clearly that I could not withdraw the prosecution unless they undertook the liability and passed the promissory note. Defendants passed the promissory note voluntarily, and next day I withdrew the prosecution."

Now, though the charge under S. 420 is compoundable with the permission of the Court under S. 345, Criminal P. C., that under S. 406 is not, and we find from the record of the criminal case that the charge under S. 420 was compounded, and the accused was discharged on the charge under S. 406 as the complainant had no evidence to prove it. No evidence was adduced, and the only inference is that the complainant refrained from adducing any evidence because the defendants had agreed to pass the promissory notes in suit, which were passed accordingly a day later. It is immaterial whether the evidence available would have proved the charge under S. 406 or not. The complainant in his complaint states that defendant 1, i. e., the accused in the criminal case, had given him a written undertaking to return the ornaments. Whether this was so or not, the fact remains that the plaintiff did not proceed with the charge under S. 406, because the defendants passed him the promissory notes in suit. The law allows the compounding of the offence under S. 420, and we need not consider that aspect of the case. The effect of the compounding, apart from the acquittal of the accused, would be that a suit for damages on the facts constituting the original offence would not lie: *Basiruddin* v. *Khairat Ali* (1).

But it is otherwise with offences which the law does not allow to be compounded. In such cases the policy of the law is not to permit the parties to interfere with the progress of the prosecution by any private arrangement, which is precisely what has happened in the present case. I have stated the facts with some detail, because it is necessary to distinguish between the numerous rulings on the subject. Some of the rulings make a distinction between motive and consideration. There is no such distinction in the present case. The motive on the part of defendants 2 and 3 (defendant 1 may be omitted from consideration) was to save defendant 1 from being prosecuted, and the consideration on the part of the plaintiff was refraining from proceeding with the prosecution. There is no other consideration, as the plaintiff practically admits, and omitting the compounding of the offence under S. 420, the plaintiff on being assured that the promissory notes will be passed, stated that he had no evidence to prove the charge under S. 406, I. P. C., and the accused was consequently discharged for lack of evidence. In these circumstances I am unable to accept the argument of the learned counsel for the respondent that there is nothing on record to show that a non-compoundable offence was compounded. The result was to stifle the prosecution, which is what the law says one may not do. The effect is to defeat the provisions of the law, as the offence under S. 406 is not compoundable. Therefore under S. 23, Contract Act, the consideration for the promissory notes is bad.

Turning to the cases, the first case on which the learned counsel for the appellant has relied is *Kessowji Tulsidas* v. *Hurjivan Mulji* (2) the facts of which are practically indistinguishable from those of the present case. One Hurjivan having misappropriated or having failed to account for certain moneys entrusted to him by the plaintiffs, they threatened criminal proceedings, and thereafter a woman who stood in the position of a mother to Hurjivan executed a promissory note, the considera-

1. (1913) 14 Cr L J 458=20 I C 618.
2. (1887) 11 Bom 566.

tion for which was the stoppage of the impending prosecution. It was held that the consideration was illegal. A man to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute. He must not however by stifling a prosecution, obtain a guarantee from third parties. Of course it makes no difference whether the criminal proceedings have been actually instituted, as in the present case, or whether there is still only a threat of them, provided the consideration is the stopping of the criminal proceedings whether actual or contemplated. To the same effect is *Dalsukhram* v. *Charles De Bretton* (3), where the plaintiff sued the defendant in damages for wrongful arrest and confinement. The defence pleaded an agreement whereby the parties had agreed to settle their differences in consideration of compounding some criminal charges, one of which was not by law compoundable, and which were then pending between the parties in a criminal Court. It was held that the object of the agreement being to stifle a prosecution, was bad in law, and that the agreement therefore could not be set up as a defence in a Court of law.

The latest case of the Privy Council is *Kamini Kumar Basu* v. *Birendra Nath Basu* (4), where it was held that where it is an implied term of a reference to arbitration and a subsequent agreement executed to give effect to the arbitrator's award, that a criminal complaint for a non-compoundable offence would not be further proceeded with, the award and the agreement are invalid, as opposed to public policy and founded on an unlawful consideration, even though no prosecution within the meaning of the Code has in point of law been started: cf. also *Majibar Rahman* v. *Muktashed Hossein* (5), where it was held that it is contrary to public policy to compound a non-compoundable criminal case, and any agreement to that end is wholly void in law. None of the cases relied on by the respondent lay down a principle contrary to this. In *Jai Kumar* v. *Gauri Nath* (6) there was a distinct finding that the promissory note was not for the purpose of stifling a criminal prosecution, and the case of *Kessowji Tulsidas* v. *Hurjivan Mulji* (2) was quoted with approval. In *Onkar Mal* v. *Ashiq Ali* (7) it was held that a compromise, which is otherwise a fair and reasonable one, is not invalidated because in connexion therewith a trifling charge of theft between the servants of the parties has been withdrawn. It was held there that one of the motives of the compromise may have been the withdrawal of the criminal case, but it could not be said to be the only motive. *Dwijendra Nath* v. *Gopiram Gobindaram* (8) was one decided upon peculiar facts, and at p. 61 it is stated that if the offence is not compoundable under the law, a compounding of it must be held to be illegal and opposed to public policy.

In that case it was held that the administration of justice was not taken out of the hands of the authorities. In the other case quoted by the learned counsel for the respondent, *Sukhdeo Das* v. *Mangal Chand* (9), it was held that where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable, the agreement is not enforceable by law, but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise. In all these cases therefore the principle laid down in *Kessowji Tulsidas* v. *Hurjivan Mulji* (2) and recently by the Privy Council in *Kamini Kumar* v. *Birendra Nath* (4), namely, that the prosecution is not to be stifled by any private agreement between the parties, has been followed, and in any event we are bound by the decision of the Privy Council in *Kamini Kumar* v. *Birendra Nath* (4). The present case is a very clear case, where the consideration for the agreement, i. e., the promissory notes, is the withdrawal of the prosecution. I am therefore of opinion that the consideration for the promissory notes in the present case

3. (1904) 28 Bom 326=6 Bom L R 73.
4. AIR 1930 P C 100=123 I C 187=57 I A 117=57 Cal 1302 (P C).
5. (1913) 40 Cal 113=15 I C 259.
6. (1906) 28 All 718=3 A L J 506=(1906) AWN 212.
7. AIR 1927 All 318=100 I C 499=49 All 540.
8. AIR 1926 Cal 59=89 I C 200=53 Cal 51.
9. (1917) 2 Pat L J 630=41 I C 812.

being the compounding of a non-compoundable criminal charge, the agreement is void in law. The decree of the lower Court will therefore be reversed as far as defendants 2 and 3 are concerned, and the suit against them will be dismissed, although defendant 2 has not appealed. The respondent will bear the costs of defendant 3 in both Courts.

Shingne, J.—I agree. On the facts of the present case the conclusion is inevitable that the consideration for the promissory notes in the present case was the compounding of a criminal charge which could not have been compounded. If so, under S. 23, Contract Act, the consideration was unlawful and the promissory notes cannot be enforced against defend nts 2 and 3. Reference may also be made to Illus. (h) to S. 23, Contract Act, 1872. As to the principles deducible from decided cases, the following propositions can be laid down: firstly, where the consideration for an agreement is a promise not to prosecute for an offence which is non-compoundable, the agreement is not enforceable at law: secondly: but this limitation on the freedom of contracts will only be enforced when it is quite clear that the consideration for the agreement was such an illegal promise as stated above. Thirdly, a man to whom a debt is due may take securities for that debt from his debtor, even though the debt arises out of a non-compoundable offence and he threatens to prosecute for that offence, provided he does not, in consideration of such securities, agree not to prosecute and such an agreement will not be inferred from the creditor using strong language. He must not however by stifling a prosecution obtain a guarantee for his debt from third parties.

The first proposition is illustrated by the following cases: *Kessowji Tulsidas* v. *Hurjivan Mulji* (2); *Dalsukhram* v. *Charles De Bretton* (3), *Majibar Rahman* v. *Muktashed Hossein* (5); *Bani* v. *Jayawanti* (10); and the latest decision of the Privy Council in *Kamini Kumar* v. *Birendra Nath* (4). My learned brother has discussed most of these cases and I agree with his observations. The first proposition is also illustrated by the English decisions in *Jones* v. *Merionethshire Permanent Benefit Building Society* (11), *Williams* v. *Bayley* (12), and *Collins* v. *Blantern* (13). In *Collins* v. *Blantern* (14), for instance, it was agreed between Rudge, the prosecutor, the plaintiff in the action and five persons indicted for perjury, that the plaintiff should give the prosecutor Rudge his note for £. 350 in consideration for not appearing to give evidence at the trial of the said charge and that the five persons should execute a bond to the plaintiff as indemnity for giving such note. The plaintiff gave to Rudge, the prosecutor, the note for £. 350 for not appearing as prosecutor and giving evidence. Thereupon the five persons executed the bond as settled. An action was brought on the bond. The Lord Chief Justice in delivering the judgment observed that one of the questions to be considered was (p. 409):

> "whether it doth not appear, from the facts alleged . . . that the consideration for giving the bond is an illegal consideration;"

and while deciding the question His Lordship observed (p. 409):

> "As to the first question, it hath been insisted for the plaintiff that he was not privy to the bargain and agreement, so as to him there appears to be nothing illegal done by him. But we are all clearly of opinion that the whole of the transaction is to be considered as one entire agreement; for the bond and note are both dated upon the same day, for payment of the same sum of money on the same day; the manner of the transaction was to gild over and conceal the truth; and wherever the Courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury, and therefore to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void; what right then hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful."

The second proposition stated above is borne out by the following cases: *Jai Kumar* v. *Gauri Nath* (6), *Dwijendra Nath Mullick* v. *Gopiram Gobindaram* (7), *Onkar Mal* v. *Ashiq Ali* (8) and *Sukhdeo Das* v. *Mangal Chand* (9). In all these cases the rule of law stated in the

10. A I R 1918 Bom 170 = 42 Bom 339 = 45 I C 566.
11. (1892) 1 Ch 173=61 L J Ch 133 = 40 W R 273=17 Cox C C 389=65 L T 685.
12. (1866) 1 H L 200=35 L J Ch 717 = 12 Jur (n s) 875=14 L T 802.
13. (1767) 1 Sm. L C 406.

first proposition was accepted as correct but on the peculiar facts of the cases it was held that the evidence did not justify the conclusion that the withdrawal of a prosecution for a non-compoundable offence was the consideration for the agreement sued upon in each of the cases. In *Dwijendra Nath's* case (8), mentioned above, Walmsley, J., observed (p. 56) of 53 *Cal* :

> "On this statement of the facts it must be allowed that the case comes very near the line, but on the whole, I think, that whether we use the rhetorical expression of stifling a prosecution or the more homely words of the Contract Act the action of the plaintiffs ought not to be regarded as contrary to public policy, because they did not take the administration of justice out of the hands of the authorities and themselves determine what should be done."

Very soon after the decision in *Dwijendra Nath's* case (8), Walmsley, J., sitting with another Judge, decided a case in which it was held that the agreement or ekrarnama put forth in the case was not made with the object of stifling the prosecution for non-compoundable offences: vide *Birendra* v. *Basanta Kumar*, *A. I. R.* 1926 *Cal.* 519. On appeal the Privy Council reversed the decision holding that the view taken by the High Court of Calcutta was wrong. This decision of the Privy Council is the one reported in *Kamini Kumar* v. *Birendra Nath* (4), stated in connexion with the first proposition mentioned above. Out of the English cases illustrating the second proposition, reference may be made to *Flower* v. *Sadler* (14). It was held in that case that the evidence failed to disclose " even a vestige of an agreement to stifle a prosecution for felony." Cases of this kind are clearly distinguishable from the present case and my learned brother has discussed many of them in his judgment.

The third proposition is supported by the decisions in *Kessowji Tulsidas*' case (7) and *Sukhdeo Das*' case (9): vide also *Ward* v. *Lloyd* (15). The present case is governed by the rule stated in the first proposition inasmuch as the consideration for the undertaking on the part of defendants 2 and 3 was the withdrawal of the criminal complaint in respect of a non-compoundable offence. The result is that we must reverse the decree of the lower Court so far as defendants 2 and 3 go. Though defendant 2 has not joined in the appeal, we think that this is evidently a case where we should exercise our power under O. 41, R. 33. We therefore dismiss the plaintiff's claim so far as defendants 2 and 3 are concerned. Plaintiff will pay the costs of defendant 3 both in this Court and in the lower Court. The rest of the decree of the lower Court is confirmed.

K.S.

Decree varied.

14. (1882) 10 Q B D 572.
15. (1843) 7 Scott N R 499=6 Man & Co 785=13 L J C P 5.

** A. I. R. 1933 Bombay 417

Full Bench

BEAUMONT, C. J., MURPHY AND RANGNEKAR, JJ.

Emperor

v.

Ismail Sayadsaheb Mujawar — Accused.

Criminal Ref. No. 125 of 1932, Decided on 24th March 1933, from order of Addl. Sess. Judge, Belgaum.

** (a) **Penal Code (1860), Ss. 363 and 361**—(Per *Full Bench*)**Girl below 18 but above 16 kidnapped from husband—Accused cannot be convicted under S.363**(*Beaumont, C.J., dissenting*).

(Per *Murphy* and *Rangnekar, JJ.*)—S. 361 must be read with S. 363 and the offence of kidnapping from lawful guardianship penalized by the latter section is the offence which is defined in S. 361, i. e. the person against whom the offence is committed must be under the age of 14 if a male, and under the age of 16 if a female: (*Beaumont, C. J., dissenting*). [P 419 C 2 ; P 422 C 1]

Per *Beaumont, C. J.*—There is no justification for the assumption that to constitute the offence of kidnapping from lawful guardianship it must be proved that the minor is under the ages specified in S. 361. The words of S. 363 are perfectly plain, and the Court is not justified in reading into the section words which are not there in an attempt to reconcile two sections which, in fact, do not correspond. [P 419 C 1]

(b) **Interpretation of Statutes—Headings.**

The headings in a statute can be referred to for the purpose of finding out the meaning of a doubtful expression in a section. [P 420 C 1]

(c) **Interpretation of Statutes — Marginal note.**

A marginal note can be looked at for the purpose of constructing a statute. [P 421 C 1]

(d) **Penal Code (1860) — Interpretation — Policy of legislature is immaterial.**

The policy of legislature in fixing the age limits in case of certain offences is a matter of no concern on the question of the construction of the statute. [P 421 C 2]

B. G. Rao—for the Crown.

S. K. Nabiulla—for Accused.

Beaumont, C. J.—This is a reference by the Additional Sessions Judge of Belgaum under S. 307, Criminal P. C. The accused was charged with offences under Ss. 366 and 376, I. P. C., and the

jury brought in a verdict of not guilty of any offence. The learned Judge had told the jury that it would be open to them to bring in a verdict of simple kidnapping under S. 363, but that in order to justify such a verdict they must be satisfied that the age of the girl kidnapped was under sixteen at the time of the offence. The learned Judge is of opinion that the verdict of the jury was wrong, and that the accused should have been convicted under S. 363, I. P. C., and he has, therefore, referred the matter to us.

If the learned Judge was right in charging the jury that they must be satisfied that the age of the girl at the time of the offence was under sixteen, it is, in my opinion, impossible to say that the verdict of the jury was perverse. The evidence, particularly that of the mother and the doctors, appears to show that the girl was probably just under sixteen at the time of the offence. But the evidence is by no means clear, and I think that the jury was justified in saying that they were not satisfied upon the point. There is, however, no doubt upon the evidence that the girl was under eighteen at the time of the offence, and the question, therefore, arises whether in establishing a charge under S. 363, I. P. C., of kidnapping a minor from lawful guardianship, it is necessary for the prosecution to prove that the minor, if a male, is under 14 years of age, or, if a female, under sixteen. That question is one which I have had to consider more than once, and the answer depends upon whether the definition contained in S. 361 of the Code is to be read into S. 363. The offence of kidnapping is dealt with in S. 359 and the following sections. S. 359 provides that kidnapping is of two kinds, kidnapping from British India and kidnapping from lawful guardianship. S. 360 defines kidnapping from British India and the definition does not involve any limit upon the age of the person kidnapped. S. 361 is in the following terms:

"Whoever takes or entices any minor under 14 years of age, if a male, or under 16 years of age, if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person."

It is to be noticed that that definition is not a definition of the offence of kidnapping any person from lawful guardianship, but is a definition of the offence of kidnapping a minor under the ages specified or a person of unsound mind from lawful guardianship. S. 362 deals with abduction and is not relevant. S. 363 is in the following terms:

"Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine."

That section is general in terms and the offence constituted consists in kidnapping any person from British India or from lawful guardianship without any reference to the age of the person kidnapped. It follows ex necessitate rei that the offence of kidnapping from lawful guardianship can only be committed in respect of a person who can be the subject of lawful guardianship, that is to say, a minor or a person of unsound mind. But there is nothing in the wording of S. 363 to suggest that the minor must be below the ages specified in S. 361. It is argued that, having regard to the scheme of the Code, which is first to define an offence and then by a later section to impose a penalty for the commission of that offence, and to the relative positions of the sections to which I have referred, the Court should hold that the offence of kidnapping from lawful guardianship constituted by S. 363 relates only to the offence defined in S. 361. It is clear that the two sections do not in terms correspond. To make the offence constituted by S. 363 correspond to the definition in S. 361 it would be necessary either to read S. 361 as saying that whoever takes or entices any minor under the ages specified or any person of unsound mind as mentioned is said to kidnap a person from lawful guardianship, reading the words "a person," in place of the words "such minor or person," or to read S. 363 as providing that whoever kidnaps any person from British India or any such minor or person of unsound mind as is referred to in S. 361 from lawful guardianship shall be punished, &c. It is no doubt a reasonable assumption that the legislature intended the definition in S. 361 to

correspond with the offence constituted by S. 363, but this in terms has not been done. Having regard to the great care and skill with which the Code is drawn, it is not improbable that the discrepancy between the two sections arose from some change in the intentions of those responsible after the Code was originally drafted, and it is at least as likely that the failure to bring the two sections into line arose from an omission to widen the definition in S. 361 by extending it to all minors, as from a failure to limit the penal section to a particular class of minors. There appears to me in the nature of things to be no convincing reason why a person who entices any minor away from that minor's lawful guardian should not be held to commit an offence.

It is further argued that unless the definition in S. 361 is read into S. 363 the definition section is surplusage. But that is not so. S 363 embraces the offence defined in S. 361, though it may embrace other offences too. Where the Court is dealing with kidnapping from lawfulguardianship a male under fourteen or a female under sixteen, the definitions in S. 361 directly apply. When the Court is dealing with the offence of kidnapping minors over those ages (assuming such offence to fall within S. 363) the Court would no doubt act on the definition by way of analogy, since it is plain that the expression "kidnapping from lawful guardianship" must have the same meaning whether applied to a minor above or below the ages specified in S. 361.

It is curious that there appears to be no reported case in which this question has been considered, and it would appear that the Courts in this Presidency at any rate have always assumed that to constitute the offence of kidnapping from lawful guardianship it must be proved that the minor is under the ages specified in S. 361. But, in my opinion, there is no justification for such assumption. The words of S. 363 are perfectly plain, and in my judgment the Court is not justified in reading into the section words which are not there in an attempt to reconcile two sections which in fact do not correspond. In my opinion therefore we ought to accept the reference and convict the accused under S. 363, but as my learned brethren take a different view of the law the reference must be rejected.

Murphy, J.—The point for the decision of the Full Bench arises on Ss. 361 and 363, I. P. C. The former section defines the offence of kidnapping from lawful guardianship and limits the cases to those committed against persons who are, if males, under the age of fourteen, and if females, under the age of sixteen. S. 363 provides the punishment for kidnapping from lawful guardianship but does not repeat the phrases enacting the two age limits, and as it stands, makes punishable all kidnapping from lawful guardianship, which, in the ordinary sense, would mean of persons who have a lawful guardian, that is, all persons of unsound mind, and others under eighteen or twenty-one, as the case may be, these being the two possible limits of minority.

In the case before us the girl in question must have been found by the jury to have been over sixteen or at least the jury must have thought that it had not been proved that she was under that age. I think, on the language of the section, that the wider construction of S. 363 is justified by its expression, but if it is the true one, there could be no conceivable object in enacting S. 361, with its different age limits, and providing no separate section to enable the offence defined in S. 361 to be punished. There is a difficulty in interpreting the two sections and the explanation seems to me to be that the legislature thought that the connexion between them was sufficiently clear from the explanation in S. 361, the lack of another section punishing the offence defined in S. 361, and its obvious superfluity if viewed as a special case of the offence aimed at in S. 363; and that a repetition of the phrases limiting the age of male and female victims of the offence defined in S. 361 in S. 363 was unnecessary. In my thirty years' experience of the criminal Courts, Ss. 361 and 363 have always been read together, and we have not been able to find a case of a different reading of them in any of the reports. I am therefore of opinion that the offence punishable under S. 363 in the cases of minors is that contemplated in S. 361 and not one comprising all minors in lawful guardianship.

Rangnekar, J.—In this case the jury were not satisfied that the girl was under

sixteen years of age, but there is no doubt upon the evidence that she was under eighteen years of age at the time when the offence was committed, and the question is whether the accused can be convicted under S. 363. The question really is, what are the offences made penal by S. 363 ? If the definition in S. 361 is read into S. 363, the accused must be acquitted; if not, he must be convicted. Mr. Rao says that S. 363 is general in terms and constitutes two offences : (1) kidnapping a person from British India ; and (2) kidnapping from lawful guardianship, which would include kidnapping a minor irrespective of the age limit prescribed by S. 361 and kidnapping a person of unsound mind. He further says that the words ought to be construed in their ordinary and natural sense and are capable of being construed in that way. That being so, no separate definition was considered necessary and the offence of kidnapping from lawful guardianship was created by S. 363 itself. The learned advocate also relies upon the connected sections in the same chapter which follow S. 363.

The point thus raised has not come up for decision specifically in any reported case. There are however numerous decisions of the Indian High Courts which show that as soon as it was found in any case that the victim of the outrage was a boy over fourteen or a girl over sixteen, even though he or she may be a minor under eighteen years of age, the Courts have refused to convict the accused under S. 363, and have thus in effect held that the second offence mentioned in S. 363 is the same offence as defined in S. 361. The question then is whether the construction which seems to have been uniformly put on S. 363 so far is correct.

At the outset I should like to refer to certain general principles which, I think, are applicable in this case. The scheme of the Act, generally speaking, is that there is first a definition of an offence, and then a penal provision relating to it. Unless the case falls within the ambit of the definition, there is no offence. Accordingly, the sections with which we are conerned here appear in Chap. 16, under the heading, "Of kidnapping, Abduction, &c." It is clear on the authorities that the headings in a statute can be referred to for the purpose of finding out the meaning of a doubtful expression in a section. In *Hammersmith, &c , Railway Co.* v. *Brand* (1) it was observed that the headings of different portions of a statute can be referred to to determine the sense of any doubtful expression in a section arranged under any particular heading. It is equally clear that in cases of doubt the Court can have regard to the position of a particular section in an Act. After the heading we have S. 359 in these terms:

"Kidnapping is of two kinds: kidnapping from British India, and kidnapping from lawful guardianship."

Then comes S. 360, which defines the offence of kidnapping from British India and this is followed by S. 361, which defines the offence of kidnapping from lawful guardianship. S. 362 defines the cognate offence of abduction, and then comes S. 363, which runs as follows:

"Whoever kidnaps any person from British India or from lawful guardianship, shall be punished . . . . &c."

So that the statute first under the heading "Kidnapping" says that kidnapping is of two kinds, then defines both in Ss. 360 and 361 respectively, and makes them punishable under S. 363. The arrangement of the sections seems to be complete and in conformity with the general scheme of the Code. Apart from S. 361 there is no definition of the offence of "kidnapping from lawful guardianship." Now it is said that no definition is necessary, that the offence is both created and punished by S. 363. The answer to the argument is that if the legislature intended to make kidnapping a minor from lawful guardianship, irrespective of his age, an offence, then S. 361 is clearly redundant. Secondly that part of S. 361 which refers to the case of a person of unsound mind is equally redundant. Why again was it necessary for the legislature to define the offence of kidnapping from British India in S. 360 ? Assuming that the word "kidnapping" required no explanation, can it be said that the expression "lawful guardianship" would require no definition or explanation ? In the legal acceptation of the expression it would apply to the case of either a natural or testamentary guardian or a guardian appointed under the Guardians and Wards Act. But would it include the case of a person to whom the custody of a minor is entrusted? By the expla-

1. (1868-69) 4 H L 171.

nation to S. 361 the term "guardian" has been extended to any person lawfully entrusted with the care and custody of the minor. If it be said that for that purpose the Court may adopt the definition of that expression in S. 361, the answer would be that that definition is limited only to that section and only for the purpose of that section. Without this explanation the guardianship would be limited to lawful guardianship in its legal sense. The explanation says that the term "lawful guardian" is to be understood in that extended sense only "in this section," i.e., S. 361.

Mr. Rao refers to the sections which follow S. 363. These lay down punishments for aggravated forms of offence of kidnapping as defined in Ss. 359, 360 and 361, and the offence of abduction as defined in S. 362, with certain objects and with certain motives, and that accounts for the expression "any person" occurring in those sections. It seems to be clear that wherever the word "kidnaps" occurs in those sections it can only be understood in the sense in which it is defined in Ss. 360 and 361 read with S. 359. The definitions of offences in the Indian Penal Code are exhaustive. Whenever it is provided in the definitions that whoever does such and such a thing, &c., is said to do something, &c., which is made punishable as an offence, the thing or things thus described are the essential ingredients of the offence, and unless a person comes within the ambit of the definition, he cannot be held to have committed the offence, e.g., Ss. 339, 340, 351, 378, 415, 441, &c. Reading S. 363 with Ss. 359 and 361 it follows that no one can be convicted of kidnapping from lawful guardianship unless the case comes within the ambit of S. 361. The marginal note to S. 361 supports this view. It is said that a marginal note cannot be looked at for the purpose of construing a statute. It has however been recently held by a Full Bench of the Allahabad High Court in *Ram Saran Das* v. *Bhagwat Prasad* (2) that there can be no objection to refer to marginal notes for the purpose of construing or interpreting the sections of an Act, if they are inserted by or under the authority of or assented to by the legislature. This view derives support from the observations in Maxwell on the Interpretation of Statutes, Edn. 7, at p. 37, viz.:

> "But as regards marginal notes, the rule regarding their rejection for the purposes of interpretation is now of imperfect obligation."

The learned author then mentions some cases where the marginal notes were referred to. Speaking for myself, I am, as at present advised, inclined to accept this view. But even without going so far, I think, as Collins, M. R., said in *Bushell* v. *Hammond* (3), p. 1007:

> "The side-note, also, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section."

Now the marginal note in S. 361 is "kidnapping from lawful guardianship." The second kind of kidnapping in S. 359 is also in similar words. The same expression appears in S. 363. It seems to me, therefore, that the words "kidnapping from lawful guardianship" must be construed in the same sense throughout the Code, and there is no reason why in S. 363 they should be construed in a sense different from that in which they are used in S. 361. It is said that on principle it is difficult to see why a boy of 14 or a girl of 16 should be protected and not a boy of 15 or a girl of 17. The policy of legislature in fixing the age limits in the case of certain offences is a matter of no concern on the question of the construction of the statute. The Indian Penal Code was enacted in 1860. The Indian Majority Act was enacted in 1875. When the Indian Penal Code was enacted the age of majority was 15 in Bengal and 16 in this Presidency in the case of Hindu minors under the Hindu law. In the case of Mahomedans the age was the age when the minor, male or female, attained puberty, which was presumed at the latest to be the completion of 15 years. The fact therefore that the ages of 14 and 16 are specified in S. 361 seems to indicate that the legislature did not intend that the offences of kidnapping from lawful guardianship should depend upon the age of majority under the personal law of the Hindus and Mahomedans, and the legislature seem to have considered that for the purpose of such an offence the age limit should be reduced. Before the Indian Majority Act

2. AIR 1929 All 53=113 I C 442=51 All 411 (FB).

3. (1904) 73 L J K B 1005=2 K B 563=52 W R 453=20 T L R 413=68 J P 370=91 L T 1.

the legislature might very well have taken the age of 16 for both boys and girls and this would have included all minors, whether boys or girls, Hindus or Mahomedans. It was not necessary to make any distinction as the Indian Penal Code seems to have made in S. 361 between boys and girls and fixed a lower age limit for boys and a little higher for the girls. It seems to me therefore even from the point of view of the policy of the legislature, that the ages of 14 and 16, as the case may be, were fixed upon deliberately in the definition of kidnapping a minor from lawful guardianship in S. 361 and other factors were considered besides that of legal minority. Throughout the Code there is an indication that the legislature has prescribed different age periods in the case of children and minors in connexion with certain offences. In some cases you have the age of 18 in some 14, and in others 10, and so on, e.g., Ss. 369, 372, 373, &c. Although therefore one may desire to see a change effected and the age limit advanced, it is not open to one to discuss the reasons which have led the legislature to prescribe certain limits in certain cases. For these reasons I hold that S. 361 must be read with S. 363 and that the offence of kidnapping from lawful guardianship penalized by the latter section is the offence which is defined in S. 361.

Per Curiam.—Reference is rejected, and the accused is acquitted.

R.K. *Reference rejected.*

** A. I. R. 1933 Bombay 422

BEAUMONT, C. J. AND RANGNEKAR, J.

Commissioner of Income-tax, Bombay

v.

Currimbhoy Ebrahim & Sons, Ltd.

Civil Ref. No. 12 of 1932, Decided on 28th February 1933, from decision of Commissioner of Income-tax, Bombay Presidency.

** (a) **Income-tax Act (1922), Ss. 42 and 43 — Person residing outside British India advancing loan to another residing in India —Relationship between them is that of debtor and creditor and there is no business connexion within the meaning of S. 42 so as to appoint latter as statutory agent of former.**

The mere fact that a person residing outside British India with accumulated wealth chooses to invest part of it in a loan to a person in British India does not constitute a business. And the fact that the borrower chooses to use the money which he has borrowed for the purposes of his own business does not, constitute any business connexion so far as relates to the lender. The relationship between the parties is that of debtor and creditor and nothing else, and that is not such a business connexion as is referred to in S. 42. Hence the latter cannot be appointed as the agent of the former under S. 43 for assessment. [P 423 C 1]

** (b) **Income-tax Act (1922), S. 42 — "Property" means something tangible and not merely a chose in action.**

"Property" in S. 42 means something tangible, and not a mere chose in action. A person, who has advanced a loan is entitled to merely a debt and that is not property within the meaning of S. 42. [P 423 C 2]

(c) **Income-tax Act (1922), S. 43 (c) — "Through."**

The word "through" in S. 43 (c) cannot be construed as meaning "from:" *AIR* 1928 *Bom* 448, *Rel on*; *AIR* 1930 *P C* 54, *Expl.* [P 426 C 1]

(d) **Income-tax Act (1922), S. 10 — "Business" explained.**

Carrying on business can only exist when there is a succession of acts and the performance of a single act apart from special circumstances is not enough even though it may result in gains or profits. [P 425 C 2]

Jamshed Kanga—for Commissioner of Income-tax.

M.C. Setalvad and *V.F. Taraporewala* —for the Assessee Company.

Beaumont, C. J.—This is a reference by the Income-tax Commissioner under S. 66, sub-S. (2), Income-tax Act. The learned Commissioner has propounded five questions, which involve for consideration two points. The first is whether the assessee company, Messrs. Currimbhoy Ebrahim & Sons, Ltd., are assessable to income-tax under Ss. 42 and 43 of the Act in respect of the interest on a loan of Rs. 50 lakhs which they received from H. E. H. the Nizam of Hyderabad (Dekkhan), and the second, whether they are liable to be so assessed in respect of income or profits derived from a palace belonging to His Exalted Highness in Bombay The two questions are distinct, and I will deal with the question of the loan first.

The loan of Rs. 50 lakhs was made by His Exalted Highness to the assessee company on 16th August 1929, on the terms of a written agreement, which is Ex. A. The loan was to be secured by an equitable mortgage. It was to carry interest at 7½ per cent per annum which was payable in Hyderabad, and the principal was repayable by five annual instalments, such instalments to be paid in Hyderabad. There were certain provisions under which the lender was to be entitled to see the balance sheet and profit and loss account of the borrowers

but it was not stipulated in the document that the loan was to be employed by the borrowers in their business or in any other particular manner.

The assessee company paid a sum of Rs. 3,15,214 as interest during the year ending 31st March 1931, and the question is whether they can be charged with income-tax on that sum as agents of the Nizam. S. 42, Income-tax Act, provides that in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connexion or property in British India shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person and such agent shall be deemed to be for all the purposes of the Act the assessee in respect of such income-tax. The assessee company have been appointed agents by the income-tax authorities under the provisions of S. 43, to which I will refer presently. The way the case is put by the Advocate-General is this: He says the Nizam is a person residing out of British India, and he has received certain gains, that is to say, the interest on the loan, accruing or arising through or from a business connexion or property in British India, and the Income-tax Commissioner has accepted that view of the matter. I am clearly of opinion that there is no business connexion between the Nizam and the assessee company. The business connexion must be one of the person residing out of British India, that is, the Nizam, and there is nothing to show that the Nizam is carrying on the business of money-lending. The mere fact that a person with accumulated wealth chooses to invest part of it in a loan does not constitute a business. And the fact that the borrower chooses to use the money which he has borrowed for the purposes of his own business does not, in my opinion, constitute any business connexion so far as relates to the lender. I think that the relationship between the parties is that of debtor and creditor and nothing else, and that, in my opinion is not such a business connexion as is referred to in S. 42.

Then it is said, in the alternative, if there be no business connexion, that the Rs. 50 lakhs constitute property in British India from which profits or gains accrue or arise. I am disposed to think that the word "property" should be confined to immovable property, and for this reason, that S. 6 of the Act which deals with the various classes of income subject to tax includes income from "property" and "business" and it seems to me that it is income arising under those two headings which are dealt with in S. 42. It is clear from the provisions of S. 9 that "property" as used in S. 6 is confined to immovable property, and I am disposed to think that it ought to have the same meaning in S. 42, but it is not essential for the purposes of my judgment to go as far as that. I am at any rate of opinion that "property" in S. 42 means something tangible, and not a mere chose in action. The Nizam is clearly not entitled to any specific sum of Rs. 50 lakhs, he is entitled merely to a debt, i. e., a chose in action, and it seems to me that that is not property in British India within the meaning of S. 42. That disposes of the first question in the case.

The second question arises in this way: It is said that the Nizam has a palace in Bombay which produces some profit. It is not suggested that Messrs. Currimbhoys are in fact the agents of the Nizam, or that they have anything whatever to do with his palace in Bombay. But it is said that because they pay interest on their loan to the Nizam they can be constituted as a statutory agent of the Nizam under S. 43 of the Act, and that they thereupon become liable to be assessed to income-tax in respect of all or any of the Nizam's property in British India. The argument seems to me a somewhat startling one. I think it must go as far as this, that if a bank in Bombay credit the account of a non-resident customer with interest, so that the non-resident customer receives some money from the bank, the bank can be appointed as the agent of the non-resident customer and can be assessed as his agent in respect of income-tax on the whole of that customer's property in British India, although, be it noted, there is no provision in the Act entitling the agent to recover the tax paid from the principal. It is said that we are bound to arrive at that conclusion from the terms of the Act and a recent decision of the Privy Council.

S. 43 provides that any person employed by or on behalf of a person residing out of British India, or having any business connexion with such person, or through whom such person is in the receipt of any income, profits or gains, upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of the Act, be deemed to be such agent. So that there are three classes of persons who may be appointed agent. The first is a person employed on behalf of the non-resident, and the second is a person having business connexion with such non-resident.

The assessees in the present case do not come under either of those categories. Then the third class is, "or through whom such person is in the receipt of any income, profits or gains." It is said that because the income on this debt is received by the Nizam from the assessees, the assessees are liable to be appointed as his agents. It was suggested by Sir Amberson Marten in *Commissioner of Income-tax, Bombay* v. *Bombay Trust Corporation* (1) that the words "through whom" in S. 43 have not the same meaning as the words "from whom," and he attached significance to the fact that "through" and not "from" was used. In that case this Court held that the agent within the meaning of S. 42 and S. 43 must be a person who received the profits on which the tax was to be charged, and certainly the fact that the Act confers no right on the agent who pays the tax of the non-resident to recover the amount of the tax from such non-resident would seem to afford a strong argument in favour of that view. But the Privy Council took a different view, and held that the agent need not be a person in receipt of the rents and profits. The report of the case is in 57 *Indian Appeals* at p. 49, and Lord Dunedin in dealing with the words of S. 43 describing the agent says,

"Taking the words as they stand: the respondents have a business connexion with the Hong Kong Co., and 'through them' the company is in receipt of profits or gains."

So that he treats that case as one in which the agent came within both the second and the third categories, and there is no doubt whatever that on the facts of that case there was a business connexion between the non-resident and the person appointed agent. But the question as to what was necessary in order to bring a person within the third category of agents in S. 43, that is a person through whom the non-resident is in receipt of income, was not decided, since in that case the person came certainly within the second category, and possibly also within the third category. Now I am not prepared to determine exactly what must be proved in order to bring an agent within that third category, but I am prepared to hold that it is necessary to prove that he is something more than a mere debtor. In this case Messrs. Currimbhoys are nothing, but pure debtors of the Nizam of Hyderabad. That being so, I am prepared to hold that they are not persons who can be appointed agents within S. 43. If that is so, then they cannot be charged in respect of the Nizam's palace in Bombay, which is no doubt property in British India within the meaning of S. 42. I think, therefore that the actual questions propounded must all be answered in the negative. Costs of the assessees to be paid by the Commissioner, such costs to be taxed by the Taxing Master, Original Side, as on the original side scale.

Rangnekar, J.—I agree, but I should like to state shortly my reasons. The assessee company carried on business in Bombay as managing agents of various cotton and spinning and weaving mills and other companies. In 1929 they borrowed a sum of Rs. 50 lakhs from H. E. H. the Nizam at 7½ per cent. interest on the security of their mills and other properties in Bombay on certain terms. The principal terms which seem to be material in this case are that the interest was to be paid in Hyderabad, and, secondly, the income-tax in respect thereof was to be paid by the borrowers, the assessee company. The loan was for a period of five years, and the creditor, that is to say, the Nizam, was entitled to appoint a representative, at the cost of the assessee, to look after his interest in connexion with the security. There is nothing to show whether such representative has ever been appointed. The creditor had also the right to see the balance sheet and profit and loss account of the company from year to year during

1. A I R 1928 Bom 448=113 I C 593=52 Bom 702.

the period of the loan. The loan was given in Hyderabad and was repayable also at Hyderabad.

The Commissioner of Income-tax served a notice on Currimbhoys who are the agents of the assessee company under S. 43 treating them as agents of the Nizam in respect of the income-tax due on a sum of Rs. three lakhs odd, being the amount of the interest paid by the assessee company to the Nizam for the year in question, as also in respect of a palace of the Nizam situated in Bombay. It is common ground that the Currimbhoys are not in fact the agents of the Nizam, nor have they anything to do with the palace. The assessee company showed cause against the notice, but the Commissioner held that under S. 43 and S. 42 of the Act they were agents of the Nizam, and liable therefore to pay income-tax due on the sum as well as on the income of the palace. At the request of the assessee company the present reference is made to us.

The contention of the Crown is that under S. 43 the Nizam, who for the purpose of this reference must be treated as a non resident foreigner, was in receipt of income through the Currimbhoys, and that this fact entitled the Income-tax Commissioner to treat him as an agent, which he did. Currimbhoys, thereupon became statutory agents and liable to be treated as such agents for all the purposes of the Act, one purpose being payment of the income-tax in respect of the sum of Rupees three lakhs odd, which under S. 42 must be deemed to have arisen or accrued to the Nizam through or from a business connexion or property in British India. If I understand the argument, this is how the learned Advocate-General has put his case.

The question is whether the Commissioner was right in treating the Currimbhoys as agents. S. 43 of the Act provides that (a) any person employed by or on behalf of a non-resident or (b) having any business connexion with a non-resident or (c) through whom a non-resident is in the receipt of any income &c. may be agent for the purposes of the Act if he is served with a notice by the Commissioner of Income-tax of his intention of treating him as such agent. There are thus three classes of agents. It is common ground that Currimbhoys do not come within the first. It is argued that they come within the two other classes. Then the question is whether there is a business connexion between them and the Nizam within the meaning of S. 43 and also S. 42, as the same expression occurs there. It is conceded that in this connexion the business in question must be the business of the non-resident person. Can it then be said that the Nizam is carrying on business in Bombay because he has advanced moneys to a person for the latter's own business? This is the case here. Can it be said that there is business connexion between the Nizam and Currimbhoys because the latter borrowed out of British India a sum from the former? In my opinion the answer must be in the negative. The word "business" is not defined in the Act nor is the expression "business connexion." It is clear that there must be a business in British India and there must be a connexion in respect thereof between the person in India sought to be taxed or treated as an agent and the non-resident. Now carrying on business can only exist when there is a succession of acts or a continuity of transactions or acts and the performance of a single act apart from special circumstances is not enough even though it may result in gains or profits: see *Smith* v. *Anderson* (2), *Erichsen* v. *Last* (3), *Werle & Co.* v. *Colquhoun* (4). It is not suggested, and obviously it cannot be suggested that the Nizam is carrying on money lending business, and it is difficult to see how the relationship between him and the Currimbhoys can be said to be a business connexion merely because there is this single loan made by the former to the latter. That relationship, in my opinion, is that between a debtor and a creditor.

The next question is, do the Currimbhoys come within the third class of agents? Although the words are wide and there is some force in the contention on behalf of the Crown, I think they do not. In my opinion the language must be construed reasonably. The

2. (1880) 15 Ch D 247=50 L J Ch 39=43 L T 329=29 W R 21.
3. (1881) 8 Q B D 414=51 L J Q B 86=45 L T 703=30 W R 301=46 J P 357.
4. (1888) 20 Q B D 753=57 L J Q B 323=58 L T 756=36 W R 613=52 J P 644.

Advocate-General says that in the case of a fiscal statute if a case comes within the letter of the law, the statute must be given effect to irrespective of any resulting hardship. True, but does the case come within the letter of the law? What does the law say? "Any person through whom such person is in the receipt of any income &c." Does the Nizam get the interest through the Currimbhoys? Obviously not. He does receive it from Currimbhoys. But that is not the statute. The statute does not say "any person from whom such person &c." Then why should not the statute be given effect to? In *Commissioner of Income-tax, Bombay* v. *Bombay Trust Corporation* (1) Marten, C. J., was of opinion that the word "through" cannot be construed as meaning "from." I respectfully agree. But says the Advocate-General that the case is overruled by the Privy Council. No doubt it is.

But as I read the decision of their Lordships, *Income-tax Commissioner, Bombay Presidency* v. *Bombay Trust Corporation* (5), I think it is not overruled on this point. The question whether the Bombay Company would come under the third class of agents described in S. 43 did not arise in that case. The agency which arose there came within the second class and in my opinion the observations of Lord Dunedin to which the Advocate-General refers must be read as pointing out that the two conditions necessary were fulfilled: (1) that there was a business connexion and (2) it was through that business connexion the income sought to be taxed was recovered or earned. It may be noted that the words "through and from" a business connexion also occur in S. 42. It seems to me that the point which was before their Lordships was whether there was a business connexion between the Honkong Company and the Bombay Company, and whether through the Bombay Company the income was received by the latter within the meaning of S. 42 of the Act. In my opinion the words must be construed reasonably and the mere fact that the Nizam received interest on the loan from the Currimbhoys cannot make the latter to be taxed as agents within the meaning of the words "through whom &c." in S. 43. If this section is construed in the way the Advocate-General suggests it should be, the result would be that a bank for instance which credits some interest in the account of a non-resident customer would be a statutory agent even with regard to the properties which the customer may possess in any part of British India.

In the view I have taken it seems to me that it is not strictly necessary to consider the applicability of S. 42 to the facts of this case. Having regard however to the question raised and the arguments advanced, I would like to state my conclusion. It is conceded that the income sought to be taxed accrued or arose and was received out of British India. The question is whether it cannot be constructively deemed to have been received in British India under S. 42. The Crown says that the income arose directly or indirectly through or from a business connexion in British India. This contention I have examined whilst discussing S. 43. In my opinion the connexion between the Nizam and the Currimbhoys was that between a creditor and a debtor and not a business connexion. Then it is argued that the income arose from property in British India, namely, the debt. It is argued that the debt is situated in Bombay and some reference was made by the learned Advocate-General to a decision of this Court in which it was held that the situs of the debt was the residence of the debtor: *Chunilal* v. *Chaturbhuj* (6). As far as I remember, that decision was confined to the facts of that particular case, and one fact was that the debt in that case was payable at Indore, and the debtor also resided in Indore. In this case the evidence is that the moneys were paid in Hyderabad and were repayable also there. Then it is difficult to see how the Nizam can be said to be the proprietor of the "debt" and can be said to possess property in Bombay because his debtor resides in Bombay. After the transaction was completed the only right he has is to recover the moneys which he had lent. Assuming therefore that the Rs. 50 lakhs were kept intact in Bombay, it is difficult to see how the Nizam can be said to be the owner of it. Apart from that, I think, there is considerable force in the argument

5. AIR 1930 P C 54=121 I C 532=57 I A 49=54 Bom 216 (P C).

6. AIR 1932 Bom 206=137 I C 483=56 Bom 349.

that property in S. 42 means immovable property and not a mere debt or a chose in action. In S. 6, which deals with taxable income, the various heads of income chargeable to income-tax are set out, one of them being property. Reading Ss. 6 and 9 together the word "property" there only means immovable property. There does not appear any satisfactory reason why the word should not be construed in the same sense under S. 42.

For these reasons I agree that the questions raised on the reference should be answered in the manner proposed by my Lord the Chief Justice.

K.S. *Reference answered.*

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* A. I. R. 1933 Bombay 427

BEAUMONT, C. J. AND RANGNEKAR, J.

Commissioner of Income-tax, Bombay.

v.

National Mutual Association of Australasia, Ltd.

Civil Ref. No. 11 of 1932, Decided on 27th February 1933, from decision of Commissioner of Income-tax, Bombay Presidency.

* (a) **Income-tax Act (1922), Ss. 3, 4 and 42—Non-resident is liable to tax for source of income—Profits obtained by company outside India on premiums of participating policies sent by branch in India, by investment outside India are profits or gains liable to tax in India.**

In the case of a non-resident, income which neither accrues, nor arises nor is received, within British India, may be liable to tax under the combined operation of Ss. 3, 4 and 42. Profits made by a company outside India on premiums of participating policies collected and sent by its branch in India, by investment outside India are profits or gains which are liable to tax in India : *A I R* 1925 *Cal* 34 and *A I R* 1926 *Rang* 97 (*FB*), *Foll.* [P 429 C 1, 2]

(b) **Income-tax Act (1922), Ss. 42 and 43—Principal could be assessed without appointment of agent.**

A principal could be assessed under S. 42 without the necessity of appointing an agent under latter part of the section and S. 43 : *A I R* 1921 *Mad* 212 (*SB*), *Rel on.* [P 429 C 2]

(c) **Income-tax Act (1922), S. 2 (4) and 42—Definition of "business" is not exhaustive and does not restrict meaning of "business connexion" to such definition.**

The definition of the word "business" in S. 2 (4) is not exhaustive and it does not restrict the meaning of "business connexion" to such definition. All that is necessary is that there should be a "business" in British India and a connexion between a non-resident person or company and that "business," and that non-resident person or company has earned an income through such connexion : *A I R* 1926 *Rang* 97 (*FB*), *Diss. from.* [P 430 C 1]

(d) **Income-tax Act (1922), Ss, 22 and 59—Income-tax Rules, R. 35—Commissioner can resort to R. 35 even though no data are procurable for no fault of assessee.**

Where the assessee is unable to provide particulars on which assessment can be made and if the Commissioner has no more reliable data, he can resort to R. 35 even though the data are not procurable for no fault of the assessee. [P 430 C 2]

(e) **Income-tax Act (1922), S. 66 (1)—Grounds mentioned by Commissioner in his order of reference are not necessarily binding on High Court.**

The grounds mentioned in the opinion of the Commissioner are not necessarily binding on the High Court, and the Court is entitled to go through the whole record for a proper determination of the questions raised. [P 432 C 1]

Jamshed Kanga—for Commissioner of Income tax.

F. J. Coltman and *Ratanlal Ranchhoddas, Craigie Blunt* and *Caroe*—for the Assessee.

Beaumont, C. J.—This is a reference by the Commissioner of Income tax under S. 66 (1), Income-tax Act, in which he raises certain questions relating to the assessment for the financial year 1931-32 of the National Mutual Life Association of Australasia, Ltd. The nature of that company and the sources of income liable to Indian Income-tax were discussed by this Court in *Commissioner of Income-tax* v. *National Mutual Life Association of Australasia* (1). In that case we held, following the principle established by the House of Lords in England in *New York Life Insurance Co.* v. *Styles* (2), that the premium income of the company derived from participating policies was not profits or gains liable to be charged with Indian Income-tax. We held however that the company had made certain profits which were liable to tax, particularly income derived from investments, profits from non-participating policies, and other income beyond the contributions from the participating policy holders, and as the company had not made a return disclosing those profits, we held that the Commissioner of Income-tax was entitled to assess the company under R. 35, Income-tax Rules. Now, in respect of the year in dispute, the company has made a return of three sources of income which, they say, constitute all the income chargeable according to our former decision, those three sources being, renewal premiums re-

1. A I R 1931 Bom 448=134 I C 555 = 55 Bom 637.
2. (1889) 14 A C 381=59 L J QB 291 = 61 L T 201,

ceived under non-participating policies £ 90-4-8, interest £ 3,149-1-0 and fees £ 2-9-0, a total of £ 3,241-14-8, and the company is prepared to be assessed on that income without making any deduction in respect of the expenses incurred in earning it. So that the company's case is that this sum of £ 3,241-14-8 is the only income taxable under the Indian Income-tax Act.

The learned Commissioner took the view that the company ought to have made a return in the prescribed form under S. 22 of the Act, that as the company had not made a return in the prescribed form, he was at liberty to make the best assessment he could under S. 23 (4); and that as he had no reliable data to act upon in making that assessment, he was entitled to act under R. 35. S. 22 (1) of the Act provides that the principal officer of every company shall furnish to the Income-tax officer each year a return in the prescribed form of the total income of the company during the previous year. S. 59 gives power to the Central Board of Revenue to make rules for carryiug out the purposes of the Act, and in particular they may make rules prescribing the manner in which and the procedure by which income, profits and gains shall be arrived at in the case of insurance companies. The prescribed form referred to in S. 22 is given in R. 18, and it certainly would not seem to be appropriate to a mutual life assurance company such as we have to deal with in this case, and I doubt very much whether, if a return were made in the prescribed form, it would really supply the Income-tax officer with the data he requires. I am not therefore prepared to accept his view that because he did not get a return in the prescribed form he was entitled to assume that he had not got any reliable data and therefore to bring into operation R. 35. That rule provides that the total income of the Indian branches of non-resident insurance companies, in the absence of more reliable data, may be deemed to be the proportion of the total income, profits or gains of the companies corresponding to the proportion which *their Indian premium income bears to their total premium income.*

Applying that rule in the present case, the learned Commissioner stated the premium income of the company at £ 3,244,476 that being the total premium income derived both from participating and non-participating policies. Then he takes the premium income of the company in British India at £ 87,942, and then he takes the income of the Indian branch as the proportion between £ 87,942 and £ 3,244,476. A point has been raised that the Commissioner in applying R. 35 to a mutual insurance company, or a company whose business is largely mutual, should have taken the premium income derived only from the non-participating policies. But that I think, is not the meaning of the rule, which provides for ascertaining the total income of the Indian branch by comparing the proportion which the Indian premium income bears to the total premium income. Premia received from participating policies, although not profits or gains, are nevertheless premium income. It would be a matter of chance whether a comparison of the total premium income with the total Indian premium income would be more or less in favour of the assessee company than a comparison of the total non-participating premium income with the non-participating Indian premium income. If therefore the learned Commissioner was right in applying R. 35 at all, I think that he has applied it in the right way. But the contention of the company is that that rule only applies in the absence of more reliable data, and that as the company supplied the Income-tax Officer with the actual figures of their receipts of moneys accruing or arising in British India which are liable to tax, he got all the data he could require for making a proper assessment.

If the matter rested only upon the arguments stated in the case, I should be disposed to agree with that contention. As I have already stated, I do not think that a return in the prescribed form would have provided the necessary data, and although failure to make a return in the prescribed form justified the Commissioner in making an assessment under S. 23 (4), he would not be justified in making the assessment under R. 35 if he had got a reliable data supplied to him by the company. But in arguing the case the learned Advocate-General has taken a rather different line to that which the Commissioner takes in the case stated. The learned Advocate

General contends that the profits of the company received in India in respect of participating policies, although under the decision of this Court in *Commissioner of Income-tax, Bombay* v. *National Mutual Life Association of Australasia* (1), not profits or gains liable to tax, are nevertheless profit which is received by the company in India and remitted to places outside India, and that income derived from those moneys is liable to tax under S. 42 of the Act. In Ex. G, which is an account of the proceedings before the Income-tax Officer, Mr. Blunt, on behalf of the company, argued that the premiums received in India are remitted to the head office monthly and that the same are invested outside India and any interest realized on such investments is not liable to tax in India. No doubt that admission represents what the fact is, namely, that the premiums received in India are sent to the head office, and there invested so as to produce income, and this fact has not been challenged before us. Under Ss. 3 and 4, Income-tax Act income-tax is chargeable on profits or gains accruing or arising or received in British India, or deemed under the provisions of the Act to accrue or to arise or to be received in British India. S. 42 (1) provides:

"In the case of any person residing out of British India, all profits or gains accruing or arising, to such person, whether directly or indirectly through or from any business connexion or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax. . . ."

It was held by the Calcutta High Court in *Re Rogers Pyatt Shellac & Co.* v. *Secy. of State* (3) and by the Full Bench of the Rangoon High Court in *Commissioner of Income-tax, Burma* v. *Messrs. Steel Brothers & Co. Ltd.* (4), that a company resident outside British India which received goods from branches within British India was assessable to Indian income-tax in respect of the profits made by the sale of those goods outside British India. These decisions show that in the case of a non-resident, income which neither accrues, nor arises nor is received, within British India, may be liable to tax under the combined operation of Ss. 3, 4 and 42, Income-tax Act; that is to say, a non-resident may be liable to tax in respect of sources of income, which would not be liable to tax in the case of a resident. The proposition is no doubt a somewhat startling one, but it is desirable that decisions of the Courts in India under the Income-tax Act should be uniform as far as practicable, and I think that we ought to follow these two cases without pausing to inquire whether we should ourselves have arrived at the same conclusion. I do not myself see any distinction in principle between the case of goods acquired in British India by an agent in British India, and sent to the principal, resident outside British India and there sold at a profit, and the case of moneys collected by an agent in British India and sent to the principal outside British India and there invested by him at a profit. It is further to be observed that the Madras High Court in *Chief Commissioner of Income-tax* v. *Bhanjee Ramjee & Co.* (5) held that a principal could be assessed under S. 42 without the necessity of appointing an agent under the latter part of the section and S. 43.

I think therefore that the learned Advocate-General is right in contending that profits derived from the investment of moneys representing profits derived from participating policies are profits or gains accruing or arising to the assessee company, directly or indirectly, through or from a business connexion or property in British India. One argument against that view which presents itself is that having regard to the ratio decidendi of *Style's* case (2) a company engagsd in mutual insurance business is not carrying on a business, but that argument was definitely rejected by the House of Lords in *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* (6) in which their Lordships held that a company carrying on mutual insurance business was carrying on business within the meaning of S. 52, sub-S. (2) (a), Finance Act, 1920. I think that the same reasoning must apply to the words "business connexion" in S. 42, Income-tax Act, and I am not prepared upon

3. AIR 1925 Cal 34=83 I C 273=52 Cal 1.
4. AIR 1926 Rang 97=94 I C 466=3 Rang 614 (F B).
5. AIR 1921 Mad 212=64 I C 239=44 Mad 773 (S B).
6. (1926) A C 281=95 L J K B 446=134 L T 545=42 T L R 255=70 S J 343.

this point to accept the view expressed by the Rangoon Court in *Commissioner of Income-tax, Burma* v. *Messrs. Steel Brothers & Co. Ltd.* (4) that the meaning of "business connexion" should be restricted by the definition of "business" contained in the Income-tax Act, S. 2 (4), which runs: "business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture." That is not an exhaustive definition, and does not enact that nothing but trade, commerce or manufacture can be included in the word "business."

It is said on behalf of the assessee company that it would be difficult, if not impossible for a company such as the assessee company, to provide any such data as the Commissioner requires. They would have in the first place, to show what profits they have derived from their Indian business in connexion with participating policies, and to ascertain that profit it would be necessary to have an actuarial valuation of the Indian business, because premia of life insurance business are not equivalent to profits. Then they would have to show how those profits have been invested, and what profits or gains have been derived from those investments. Investments might conceivably be in some form of business, and it might be very difficult to show what profits or gains have been derived therefrom. We were pressed also with the implications of the Advocate-General's argument. A person resident outside British India may receive moneys from a business connexion in British India in various ways. They may be moneys received from a firm in which he is a partner, or moneys received from a company in which he is a share-holder, or moneys received from a business which is managed on his behalf by an agent: they may be capital or income, and if income, they will probably have paid Indian income-tax. Are profits derived from those moneys to be regarded for all time as profits or gains accruing or arising from a business connexion in British India, and as such liable to tax under S. 42 by the machinery provided by that section, and S. 43? I feel the force of the argument, but I do not see how to avoid the conclusion that the Income-tax Commissioner is entitled to the particulars which he claims; and if the assessee is unable to provide the necessary material on which to base an assessment, then the legislature has thoughtfully provided the Commissioner, by R. 35, with a method of getting over the difficulty. If he has no more reliable data, then he may act on that rule, and the fact that no data are procurable for no fault of the assessee company seems to me to be immaterial. We must therefore answer the question put to us, (1):

"Whether the Income-tax Officer, Companies Circle, was justified in law in resorting to R. 35, Income-tax rules for the purpose of assessing the company to income-tax for the year 1931-32 having regard to the data furnished by it to the officer in the affirmative; and (2)," –

"Whether the assessment of the company to income-tax for the year 1931-32 is a legal assessment and binding upon it in view of the opinion expressed by this Honourable Court in Civil Reference No. 5 of 1928,"

also in the affirmative. Commissioner to get his costs from the assessee-company on the original side scale.

Rangnekar, J.—The short question on this reference is whether the Income-tax authorities were justified in proceeding to assess the assessee under R. 35, Income-tax Rules. R. 35 is one of the rules made under S. 59 of the Act and provides a method for calculating the profits, gains or income of a non-resident insurance company in the absence of a more reliable data; and the question is whether as the assessee contends, the return made by them was a reliable data or whether, as the Income-tax authorities say, it is not. The nature of the company and the material facts are referred to in the judgment of the learned Chief Justice. From the letter of reference it appears that the Commissioner considered that the data furnished by the assesse was not reliable for two reasons, (1) that the company had failed to put in a return in the prescribed form as required by S. 22 of the Act, and therefore under S. 23 (4) the Income-tax Officer was entitled to assess the company to the best of his judgment; and (2) that the company had failed to supply the Income-tax Officer any actuarial valuation for the Indian business even though it was specifically asked to do so, and therefore the Officer was entitled to proceed in the manner laid down in R. 35.

The learned counsel on behalf of the assessee contends that the finding of the

Commissioner on these two points cannot be accepted and that he was wrong in holding that the company has not furnished the Income-tax Officer with the reliable data. S. 22 (1) provides that the principal officer of every company shall furnish to the Income-tax Officer every year a return in the prescribed form and verified in the prescribed manner. The form which is prescribed is on the record as Ex. B. The learned counsel's argument is that having regard to S. 59 and the rules made thereunder and in particular to R. 25, the legislature recognised that the prescribed form referred to in S. 22 (1) was not applicable to a company carrying on business such as the assessee company is doing. It seems to me that there is considerable force in this argument. S. 59 provides that the Central Board of Revenue may make rules prescribing the manner in which and the procedure by which the income, profits, and gains shall be arrived at in the case, among others, of insurance companies. R. 25 of the rules seems to support this contention, and shows that the method of assessing the profits or gains of life insurance companies must in its very nature be different from that employed in the case of an ordinary trading concern or business, and so does R. 35. In view of the conclusion to which we have come, it is not necessary to pursue the matter further. Mr. Coltman's second argument, 'that having regard to the nature of the business of the company which carries on a world-wide business of mutual insurance it would not be possible to have an actuarial valuation limited to its Indian business only, seems to me to be well founded. Before us however the learned Advocate General supports the course taken by the Income-tax authorities by relying on S. 42 (1) of the Act. It runs :

"In the case of any person residing out of British India, all profits or gains accruing or arising, to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax . . ."

It is argued that this section is a machinery section and therefore for the purposes of this case the provisions of this section cannot be relied upon by the Crown. In *Re Rogers Pyatt Shellac & Co.* v. *Secretary of State* (3) it was held that the first part of sub-S. (1) of S. 42 is a charging section and the latter part, which provides for such profits or gains as are referred to in the earlier part of the section should be chargeable to income tax in the name of the agent of the party &c., is a machinery section. With that opinion I respectfully agree. It seems to me that S. 42 (1) must be read with Ss. 3, 4 and 6, and the definitions of the words "assessee" and "company" in the Act. Reading these sections together, the plain meaning of the statute is that if a non-resident company carries on business in British India, then profits or gains are chargeable to income-tax under Ss. 3 and 4 read with S. 6. But if a non-resident company earns any profits or gains, directly or indirectly, even though the same accrue or arise outside India, provided they are earned or derived through or from a business connexion or property in British India, then for the purposes of the Act such profits or gains should be deemed to be within the meaning of S. 42 of the Act. The view I am taking of the relevant sections derives support from In *Re Rogers Pyatt Shellac & Co.* v. *Secy. of State* (3) and from the Full Bench decision of the Rangoon High Court in *Commissioner of Income-tax, Burma* v. *Messrs. Steel Brothers & Co. Ltd.* (4). The question, then, is whether on the facts of this case S. 42 would apply. Before discussing it, I shall deal with the assessee company's complaint that the ground now put forward by the Advocate-General was not one of the grounds on which the Commissioner relied for holding that the return made by the Company was not "reliable data." It is undoubtedly true that this is not relied upon as one of the grounds by the Commissioner for holding that the data furnished by assessee was not reliable. But the record shows that the real complaint of the income-tax authorities was that the assessee was not disclosing the interest earned during the accounting period on the premium income derived from the holders of the participating policies, and this appears from p. 18 of the record. There the Income-tax Officer observed as follows:

'"The learned solicitor who appears for the assessee argues that the premiums received in India are remitted to the Head Office monthly

and that the same are invested outside India and any interest realized on such investments is not liable to tax in India."

This also appears from the order passed by the Income-tax Officer, reference to which will be found on p. 19 of the record. I do not think therefore that the assessee can be said to have been taken by surprise by the contention raised by the learned Advocate-General. Apart from that it seems to me that the grounds mentioned in the opinion of the learned Commissioner are not necessarily binding on this Court, and the Court would be entitled to go through the whole record for a proper determination of the questions raised. The view of the income-tax authorities was that the return did not show the true income or profits or gains of the company. The return of the company showed (1) renewal premiums for non-participating policies, (2) interest earned on the premium income of both participating and non-participating policies in British India, and (3) fees. This return did not refer to the interest admittedly earned outside India on both kinds of policies. The assessee relied on *Commissioner of Income-tax* v. *National Mutual Life Association of Australasia* (1), and their contention was that they were not bound to do so in view of the decision in that case. In my opinion the point as to what items were chargeable to income-tax in respect of the profits or gains made by a mutual insurance company did not specifically arise in that case, although it is true that some reference to the same is to be found in one part of the judgment. But, as far as I can see, the principle of *Style's* case (2) was accepted, and it seems to me, both under that case and on principle, that the interest earned on premium income from participating policies would be income chargeable to income-tax under the Act. With regard to the applicability of the principle in S. 42, the contention of the appellant company is that the section does not apply as the premium income was sent outside British India and interest earned on it was also received outside British India, and in respect thereof there could be no business connexion as such as contemplated by S. 42. The first question is, was there a business connexion? There is no explanation or definition of "business connexion" in the Act, nor of "business" as such, though S. 2 (4) says that "business" includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture. It is clear that this is not a definition. The word "includes" in the interpretation clauses is intended to be enumerative and not exhaustive and it has an extending force and does not limit the meaning of the term. In the corresponding S. 3, English Finance Act of 1915 the words are "through or from any branch, factories, agency, receivership or management." In my opinion, the expression "business connexion" is a more comprehensive expression as including not only the kinds of things specifically described as being included in the term, but the kind of things which are specifically mentioned in the English Act. All that is necessary is that there should be a "business" in British India and a connexion between a non-resident person or company and that "business," and that the non-resident person or company has earned an income through such connexion.

It has been held in *Commissioner of Income-tax, Burma* v. *Messrs. Steel Brothers & Co. Ltd.* (4) that the expression "business connexion" should be confined as described by what is stated in S. 2 (4). With all respect, I am unable to agree. In the Calcutta case to which I have referred, it was held that there was a business connexion although all that happened was that goods were purchased in India by an agent and sent to the principals outside India and there sold at a profit. If any thing, the position in this case is stronger. Here, the company carries on insurance business and issues policies in respect of which it earns premiums. Such premiums or for accumulations thereof are sent out being invested outside Brisish India. It is difficult to see how the interest earned thereon, though earned outside, cannot be said to be profits arising, if not directly, at least indirectly, through a business connexion in India.

There is nothing in the nature of the business of a company carrying on mutual insurance business which would take the case out of the category of "business." It was held in *Cornish Mutual Assurance Co.* v. *Inland Revenue Commissioners* (6) that a company carrying on mutual insurance business was

carrying on business within the meaning of S. 52, Finance Act, 1920.

In the course of the discussion it was suggested that before S. 42 can apply it is necessary that a notice under S. 43 must be served on a person by the Income-tax Officer stating that he intended to treat him as the agent of the non-resident person before such person can be treated as an agent and chargeable to income-tax within the meaning of S. 42, and as that was not done in this case, S. 42 did not apply. The answer to the argument is that in this case the principal is sought to be taxed under the Act and the income which was not shown in the return was his income by reason of the meaning of the word "income" in S. 4 as extended by S. 42. The point arose in *Chief Commissioner of Income-tax* v. *Bhanajee Ramjee & Co.* (5) and it was held that a principal was liable to assessment under S. 42 without an agent being appointed under S. 43. In my opinion this view is correct. I think therefore having regard to the provisions of S. 42, read with Ss. 3 and 4 and the definitions of "assessee" and "company" in S. 2, the interest earned on premiums from participating policies was taxable, and as that was not shown in the return made by the assessee company, the income-tax authorities were right in holding that the data furnished was not "more reliable" within the meaning of R. 35. They were therefore entitled to proceed under R. 35 read with S. 23 (4). I also agree, though not without some hesitation, that the Commissioner in calculating the assessable income under R. 35 has applied the rule in the correct way. I agree therefore that both the questions raised by the Commissioner must be answered in the affirmative. Undoubtedly the construction put on S. 42 by us leads to some startling results, some of which are pointed out by the Chief Justice. But if, as I think, the case comes within the letter of the law, the question as to the policy of the legislature or the resulting consequences is a matter of no relevance.

K.S. *Reference answered.*

1933 B/55 & 56

A. I. R. 1933 Bombay 433

BEAUMONT, C. J. AND RANGNEKAR, J.

Manilal Lallubhai and *another* — Appellants.

v.

Bharat Spinning and Weaving Co., Ltd.—Respondents.

Original Civil Jurisdiction Appeal No. 51 of 1932, Decided on 24th March 1932.

(a) Arbitration—Award can be in name of a firm.

If a firm in the name of the firm enters into a contract containing a clause for submission of disputes to arbitration, the award can be in the firm's name against the firm. [P 434 C 1]

(b) Civil P. C. (1908), O. 21, R. 50 (2) — Holder of award can enforce it under O. 21, R. 50 (2) by applying to High Court — Arbitration Act (1899), S. 15.

Order 21, R. 50 (2), can be read as meaning that where the holder of an award, which has become enforceable as a decree, claims to be entitled to cause the award to be executed, he shall apply to the High Court, as the Court referred to in S. 15, Arbitration Act : *A I R* 1920 *Cal* 386, *Rel on.* [P 435 C 1]

(c) Bombay High Court Rules, Rr. 80 Cl. (o) and 373 — Application to enforce award can be by originating summons and need not be by petition.

Application to enforce an award under O. 21, R. 50 (2), Civil P. C., can be by summons and need not be by a petition. But it must be an originating summons since there are no pending proceedings. [P 435 C 1]

R. S. Billimoria and *M. S. Vakil*—for Appellants.

M. C. Setalvad, M. A. Somji and *J. S. Khergamvala*—for Respondents.

Beaumont, C. J. — This is an appeal from a decision of Kania, J. It arises on a summons taken out in the matter of an arbitration seeking to make the two appellants liable on an award made against a firm. The material facts giving rise to the dispute are that in the year 1925 there was a firm called Vallabhdas Hiralal doing business in piecegoods in Bombay, and the partners in that firm were another firm called Ramniklal Manilal, a man named Hiralal, and a man named Umersi. The partners in the firm of Ramniklal Manilal were the two appellants in the present case and a man named Harakchand. Towards the end of the year 1928 the firm of Vallabhdas Hiralal was dissolved, and a new firm was started, which I will call "the respondent firm," Mulchand Pranjivandas. It is admitted that in that firm Umersi and Harakchand were partners, they having been partners in the old firm, Umersi in his own right and Harakhchand as a partner in the firm of Ram-

niklal Manilal, and Hiralal was not a partner.

The question which arises in these proceedings is whether or not in that new firm the two appellants were partners, either individually or as being partners in the firm of Ramniklal Manilal. After the formation of the respondent firm dealings took place between the respondents in this appeal, namely, the Bharat Spinning and Weaving Co., Ltd., whom I will refer to as "the plaintiffs," and that firm. All the contracts, which were for substantial amounts, were signed on behalf of the respondent firm by Umersi. Towards the end of the year 1930 the respondent firm seems to have been in financial difficulties and moneys due to the plaintiffs were not paid. The matters in dispute were referred to arbitration, I suppose under the arbitration clauses in the various contracts, and on 12th February 1931, an award was made, under which the respondent firm were held liable to pay to the plaintiffs a sum approximately of Rs. 50,000. Down to the date of that award there is no evidence of any demand having been made by the plaintiffs for payment from the appellants. All demands were made to the respondent firm by its name. On 2nd March, for the first time the plaintiffs made a demand for payment of the amount found due on the award from the two appellants, and they at once denied their liability, and asserted that they were not partners and never had been partners in the respondent firm. On 21st July 1931, a summons was taken out, purporting to be under O. 21, R. 50 (2), and it is in respect of the findings of the issues raised on that summons that this appeal is brought.

In the first place certain preliminary objections are taken to the form of the proceedings. It is said, first that there cannot be an award against a firm in the firm name. There is, in my opinion, no substance in that point. If a firm in the firm name enters into a contract containing a clause for submission of disputes to arbitration, I see no reason why the resulting arbitration should not be in the firm name. A more substantial point is that the provisions of O. 21, R. 50 (2), do not apply to proceedings to enforce an award. On the actual language of that sub-rule there would certainly seem to be force in the objection. The sub-rule provides, so far as material, that where a decree-holder claims to be entitled to cause a decree to be executed against any person as being a partner in the firm, he may apply to the Court which passed the decree for leave to execute the decree, and the Court may either grant leave or order the question of liability to be tried or determined in any manner in which an issue in a suit may be tried or determined. It is said that that rule cannot apply to enforcing an award, because there is no decree-holder and there is no Court which passed the decree. The question however cannot be disposed of merely by reference to the language of the sub-rule. Under the Arbitration Act, S. 15, it is provided that an award, on a submission on being filed in the Court according to the foregoing provisions, shall be enforceable as if it were a decree of the Court ; and the "Court" is defined in S. 4 of the Act in such a way that for the purpose of these particular proceedings the Court is the High Court. So that what S. 15 provides is not that the award is to become a decree, but that it shall be enforceable as if it were a decree of the High Court.

The difficulty is that in O. 21, which is the order dealing with execution proceedings, the language is throughout inapplicable to enforcing an award, and it seems to me that we have really to choose between two things, either we must say that S. 15, Arbitration Act, is of no effect because there are no provisions by which an award can be enforced as if it were a decree, or we must read the relevant provisions of O. 21 as covering an award, by treating "decree" as including an award which has become enforceable as a decree, and by treating "the Court which passed the decree" as referring to the Court whose decree the award is to be treated as being for the purpose of execution, that is in this particular case the High Court. I say that because under R. 10, O. 21, which is the rule under which execution is ordinarily started, it is provided that if the holder of a decree desires to execute it, he shall apply to the Court which passed it ; and unless we read that rule in the case of an award, in the sense I have suggested, there are no provisions for enforcing an award which has become enforceable as a decree. I am not prepared to hold

that S. 15, Arbitration Act, is really a dead letter. The same construction would have to be adopted under R. 16, O. 21, and indeed that construction has been adopted by the Calcutta High Court in the case of *Louis -Dreyfus & Co.* v. *Purusottum Das Narain Das* (1). If that construction is adopted under Rr. 10 and 16, I see no reason why a similar construction should not be adopted under R. 50 (2), and why we should not read R. 50 (2) as meaning that where the holder of an award, which has become enforceable as a decree, claims to be entitled to cause the award to be executed, he shall apply to the High Court, as the Court referred to in S. 15, Arbitration Act. I think therefore that the preliminary objection must be overruled.

Then another preliminary point was taken, namely, that under R. 373 of the High Court Rules applications under the Arbitration Act have to be made by petition and the application here was by summons. But the answer to that is that under R. 80, Cl. (o), application for leave under O. 21, R. 50 (2), may be disposed of by a Judge in Chambers; and if that rule applies to enforcing an award, then R. 80, Cl. (o), must apply to application for enforcing an award. The summons in the present case is clearly in the wrong form. It is entitled as it should be :

> "In the matter of the Arbitration Act and in the matter of an arbitration between the Bharat Spinning and Weaving Co., Ltd., and the firm of Mulchand Pranjiwandas and Award dated 12th February 1931,"

and then it is expressed to be between the Bharat Spinning and Weaving Co., Ltd., as petitioners and Mulchand Pranjiwandas as respondents. If there are to be parties to the summons at all, they ought to be called plaintiffs and defendants. But, in my opinion, it is not necessary that a summons under the Arbitration Act should be inter partes; but it must be an originating summons since there are no pending proceedings. The summons must therefore be amended by turning it into an originating summons and striking out the reference to petitioners and respondents. I think therefore the learned Judge was right in dismissing the preliminary objections and hearing the evidence on the merits.

1. AIR 1920 Cal 386=56 I C 325=47 Cal 29.

[The rest of the judgment is not material to this report.]

Rangnekar, J.—(His Lordship, after stating facts and discussing evidence, proceeded) I shall now refer briefly to the preliminary points raised by Mr. Billimoria on behalf of the appellants. The first of them is that an award cannot be made against a firm in the firm name. But if a firm as such is a party to a reference and the submission is signed by the firm in the firm name, I see no objection to the award on the reference being made in the firm name. Apart from other authorities this is the view which is taken by the Calcutta High Court, and I respectfully agree with it.

The next contention is that the provisions of O. 21, R. 50, do not apply to an award made under the Arbitration Act. The argument is that an award is not a decree and therefore there is "no decree-holder" and "no Court which passed the decree." Undoubtedly the language of O. 21, R. 50, seems to lend support to the argument, but I think we must read the provisions of the Code with the Arbitration Act. S. 15, Arbitration Act, provides that an award on a submission on being filed in the Court under the Act, shall be enforceable as if it were a decree. S. 11 (2) provides that the arbitrators at the request of a party to a submission or any person claiming under him and on payment of fees and charges and costs of filing, etc., shall cause the award to be filed in Court. S. 4 of the Act, defines "the Court" in the Presidency Towns to be the High Court. The Arbitration Act does not lay down any separate or special procedure for enforcing an award made under the provisions of the Act, and unless one can turn to the Civil Procedure Code, it is difficult to see how an award can be enforced otherwise than perhaps by a suit. The plain meaning of the provisions of the Arbitration Act to which I have referred seems to me to be that an award under the Arbitration Act on being filed in the High Court can be enforced, that is, executed, as if it were a decree of the High Court.

The procedure for enforcing a decree of the High Court is contained in O. 21 of the Code, and the principal rule of that order is R. 10. It provides that if the holder of a decree desires to execute

it, he shall apply to the Court which passed it. It is not disputed that in the case of an award under the Arbitration Act against an individual the award can be enforced in accordance with the provisions of O. 21 of the Code. That being the case, and reading the relevant provisions of the Act and the provisions of O. 21, I think it must be held that in such a case the party applying to enforce an award is "the holder of a decree," and the High Court in this particular case is the "Court which passed the decree." The result of holding otherwise would be to make S. 15, Arbitration Act, for all practical purposes a dead letter, prevent the parties from enforcing their rights summarily, and thus defeat the very object for which the law of arbitration is enacted. I think therefore this contention must also be overruled.

Then there remains the third contention that the respondents ought to have proceeded by a petition under the Arbitration Act, and not by summons. But under R. 80 of our rules an application for leave under O. 21 should be made by a summons, and therefore there is, in my opinion, no substance in this contention. In the result, I agree that the appeal must be allowed.

K.S. *Appeal allowed.*

A. I. R. 1933 Bombay 436

BEAUMONT, C. J. AND RANGNEKAR, J.

Narayan Khanderao, In re.

Original Civil Jurisdiction Appeal No. 65 of 1932, Decided on 21-4-1933.

Succession Act (1925), S. 372—Succession certificate should be granted only to guardian and not to minor and only when guardian is appointed under Guardians and Wards Act.

A certificate under S. 372, should only be granted where the guardian has been appointed guardian of the property under the Guardians and Wards Act. The form of certificate should not be in favour of minor. The proper form is for the certificate to be granted to the guardian who should be empowered to recover, transfer or negotiate or otherwise deal with the securities in question for the use and benefit of the minor and to pass valid receipts on his behalf. [P 436 C 2]

Rodrigues—for Appellant.

Beaumont, C. J.—This is an appeal from an order of Wadia, J. The applicant as the mother and natural guardian of the minor sons applied for the grant of a succession certificate under S. 372, Succession Act 1925. Wadia, J., declined to grant the certificate unless the guardian got herself appointed guardian under the Guardians and Wards Act. We were referred to various athorities. There is a case of this Court *Gulabchand* v. *Moti* (1), which the learned Judge followed. In that case the Court held that a succession certificate can be granted to the guardian of a minor who had been appointed as such under the Guardians and Wards Act; but the case did not decide that a certificate could not be granted in the absence of such an appointment. We were also referred to cases of other High Courts in which certificates have been granted where no appointment of the guardian has been made under the Guardians and Wards Act. But apparently in those cases the certificate was granted to the minor. We reserved judgment in order that we might ascertain what the practice has been in the office in this Court, and we find that the practice has been to grant a certificate only where the guardian has been appointed under the Guardians and Wards Act, and the form of the certificate has been in favour of the minor. We think that that is the wrong form. It is impossible for the minor actually to give receipts for money which may be collected under the certificate, and we think that the proper form is for the certificate to be granted to the guardian who should be empowered to recover, transfer or negotiate or otherwise deal with the securities in question for the use and benefit of the minor and to pass valid receipts on his behalf. The question then remains whether a certificate in that form should be granted to a guardian who has not been appointed under the Act. In our view such a certificate should only be granted where the guardian has been appointed guardian of the property under the Act. We have the direct authority of this Court in *Gulabchand* v. *Moti* (1) that a certificate can be granted in such a case, and we think that the correct course is to follow the decision in that case and require the guardian to be appointed under the Guardians and Wards Act before a certificate is granted to her. The appeal therefore must be dismissed. Costs will be costs in the petition.

K.S. *Appeal dismissed.*

1. (1900) 25 Bom 523=3 Bom L R 795.

*** A. I. R. 1933 Bombay 437**

BEAUMONT, C. J. AND RANGNEKAR, J.

Official Assignee of Bombay—Appellant.

v.

Abdul Hayee—Respondent.

Original Civil Jurisdiction Appeal No. 64 of 1932 and Insolvency No. 300 of 1931, Decided on 29th March 1933, from order of Wadia, J., D/- 20th September 1932, in Insolvency No. 300 of 1931.

*** Trusts Act (1882), S. 66—Trustee mingling trust property with his own becoming insolvent—Beneficiary is entitled to charge on trustee's property—Beneficiary obtaining personal judgment against trustee without preserving charge loses right to enforce charge—Civil P. C. (1908), O. 2, R. 2.**

Where a trustee mingles trust property with his own and becomes insolvent, the beneficiary is entitled to a charge on the trustee's property which vests in the Official Assignee; but if the beneficiary takes a personal judgment for the amount due to him without taking steps to preserve his remedies based on the trust, he loses his right to enforce the charge. [P 437 C 1]

Jamshed Kanga—for Appellant.

M. C. Setalvad—for Respondent.

Beaumont, C. J.—This is an appeal by the Official Assignee from a judgment of Wadia, J. The point raised is a very short one, but not altogether free from difficulty.

The insolvents were a firm called the White Kerosene and Mineral Oil Co., and before the insolvency they were minded to employ the present respondent Moulvi Abdul Hayee as a sub-agent on the terms of an agreement which was prepared in draft, under which the sub-agent was to pay Rs. 1,000 as deposit to be retained by the insolvent firm who were to pay interest on it. The respondent paid the Rs. 1,000 before the agreement was executed, and in fact the agreement was never executed. The deposit of Rs. 1,000 was paid on 25th June 1930, and on 24th April 1931, the White Kerosene and Mineral Oil Co. were adjudicated insolvents. In the meantime the respondent had started a suit in a Court at Karachi for the purpose of recovering his deposit, and on 6th May 1931, i. e., after the date of the insolvency, he recovered a judgment for Rs. 1,000, the amount of the deposit, with interests and costs. The question which arises in the insolvency is, whether the respondent is entitled to recover the Rs. 1,000 as moneys held by the insolvents at the time of the insolvency on trust for him, or whether he has merely a right to prove in the insolvency for the amount of his debt. The Official Assignee held that the respondent was only entitled to prove for the amount. The learned Insolvency Judge reversed that decision as he was of opinion that the respondent was entitled to recover the moneys specifically and from that decision this appeal is brought.

It is, I think, quite clear that if an agreement in the terms of the draft had been executed and the deposit paid under it, the moneys would have formed part of the general assets of the insolvents, and the respondent's only remedy would have been to prove for his debt in the insolvency. But inasmuch as the deposit was paid before the agreement was executed, I think, the moneys were paid to the insolvents for a specific purpose, that is to say, the insolvents held the moneys in trust, if the agreement was not executed, to return them to the respondent; and if the agreement was executed, to hold them on the terms which might be arranged under the agreement. As the agreement was not executed, I think the insolvents became bound to return the moneys specifically to the respondent. So far I agree with the learned Judge, but then a question arises which does not seem to have been discussed before the learned Judge. That question relates to the effect of the judgment recovered by the respondent after the insolvency. It is argued on the one hand by Mr. Setalvad for the respondent that under S. 52, Presidency Towns Insolvency Act, property held by an insolvent in trust for any other person is not divisible amongst his creditors, and that it is only property divisible amongst his creditors as defined in S. 52 which vests in the Official Assignee under S. 17. It follows that these Rupees 1,000 never in fact vested in the Official Assignee, and that the recovery of a judgment for this amount could not have any effect upon the vesting of the property and therefore the Official Assignee must return this specific amount to the respondent. On the other hand the Advocate-General points out that these Rs. 1,000 were never in fact kept distinct from the other property of the insolvents, and therefore the respondent can only enforce his right against the

Rs. 1,000 on the principle of following trust moneys.

That principle is governed in India by S. 66, Trusts Act, which provides that where the trustee wrongfully mingles trust property with his own, the beneficiary is entitled to a charge on the whole property of the trustee for the amount due to him. It is argued therefore that at the time of the insolvency the property of the insolvents vested in the Official Assignee, but subject to a charge for these Rs. 1,000 in favour of the respondent, and I think that view is right. Then it is said that the respondent having a charge for Rs. 1,000 on the assets of the insolvents which charge it is admitted, never vested in the Official Assignee, the effect of the respondent recovering a judgment for the amount of the debt was either to extinguish the charge, or at any rate to make it unenforceable under the provisions of O. 2, R. 2, Civil P. C. At the time when the respondent started his suit in Karachi he had two rights, first, to recover the Rs. 1,000 as moneys held in trust for him, and, secondly, to recover the money in debt. Having taken a personal judgment for the amount without taking steps to preserve his remedies based on the moneys being held in trust, it appears to me that the effect of O. 2, R. 2; is that the respondent has lost his right to enforce the charge based on the doctrine of trust. If that is so, I do not see any ground under which we can order the Official Assignee to repay the Rs. 1,000 in specie to the respondent. That being so, I think we must allow the appeal. Appellant's costs to come out of the assets of the insolvents. Respondent to bear his own costs, this being in the nature of a test case.

Rangnekar, J.—I agree. I need not refer to the facts which are set out in the judgment of the learned Chief Justice. The answer to the short question in this appeal depends upon the position of the parties on 24th April 1931, and 6th May 1931. Now it is clear on the facts, which are not disputed, that on 24th April 1931, when the White Kerosene and Mineral Oil Co. were adjudicated insolvents, a sum of Rs. 1,000 was held by the firm in a fiduciary capacity, as the sum was given to the former for a specific purpose, and as the agreement under which it was given was not completed, the former was bound to return the same to the appellant. But the sum was not set apart by the company and was used by them. The only remedy therefore of the appellant against the company would be to sue them to recover the amount and obtain a charge in respect of it on the company's property under S. 66, Trusts Act. It is clear therefore that on the insolvency of the company the whole property of the company vested in the Official Assignee, but as to this sum subject to a charge in favour of the appellant under S. 66, Trusts Act. But on 6th May 1931, the appellant obtained a decree for the amount against the company. In the suit however the respondent did not apply for leave to reserve his other remedy by way of a charge on the property of the company in accordance with the provisions of O. 2, R. 2, Civil P. C. It would not then be open to him to enforce the remedy in any subsequent proceeding and that being the case, it is difficult to see how he can now enforce the charge against the Official Assignee and how it can be contended that the Official Assignee held the amount on trust. If this aspect of the case had been put before the learned Judge. I am sure he would have taken the view which we are taking now. I agree therefore that the appeal must be allowed.

K.S. *Appeal allowed.*

A. I. R. 1933 Bombay 438

MURPHY AND WADIA, JJ.

Maula Bovji Shikaldar and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 112 of 1932, Decided on 30th June 1933, from order of Second Class Magistrate, Islampur.

Arms Act (1878), S. 22— Sword-sticks are swords within meaning of notification of Bombay Government under Indian Arms Rules, 1924.

The word "sword" includes sword-sticks; hence selling of a sword-stick or the using of it without license is an offence under S. 22 by virtue of notification of Bombay Government under the power conferred by the Indian Arms Rules, 1924 : 34 *Cal* 749, *Rel on.*, *AIR* 1930 *Bom* 159, *Dist.* [P 439 C 1]

K. J. Kale—for Applicants.

B. G. Rao—for the Crown.

Wadia, J.—The two applicants were convicted by the Second Class Magistrate of Islampur under S 22, Arms Act (11 of 1878), and sentenced to pay a fine of Rs. 10 each, or in default to undergo simple imprisonment for ten days. The facts of the case are not disputed. On 6th October 1928, applicant 1 sold a sword-stick to applicant 2. Applicant 1 had no license to sell arms, nor had applicant 2 any license to possess or carry arms. By a notification No. 1234—Pol. of 3rd August 1925, the Government of Bombay, in exercise of the powers conferred on them by entry No. 1 in the table subjoined to Sch. 2 appended to the Indian Arms Rules, 1924, declared that swords, with the exception of certain kinds which were specifically mentioned, were subject to all the provisions contained in the Indian Arms Act, throughout the whole presidency. It is admitted that sword-sticks have not been excluded specifically under item (3) of the table annexed to this notification. The contention on behalf of the applicants however is that sword-sticks do not fall within the meaning of the word "swords" used in this table. In support of this contention, our attention has been drawn to the fact that in item (4) of the same table sword-sticks are specifically mentioned as being subject to the prohibitions of the Act in Bombay and Karachi cities. The contention is that if it was the intention of the legislature that sword-sticks should be treated as swords there was no necessity to mention sword-sticks separately in item (4). We are however of opinion that separate mention of sword-sticks in item (4) was unnecessary, and was probably done as a matter of caution. Under the ordinary interpretation of the word "sword," that word would include sword-sticks. We are supported in this view by the decision in *Emperor* v. *Satish Chandra Roy* (1), in which it was held that a sword-stick is a "sword" within the meaning of the term "sword" in the Indian Arms Act.

On behalf of the applicants reliance has been placed on the ruling in *Emperor* v. *Babaji Manaji* (2), in which it was held that the mere possession of a jambia (a kind of dagger) was not an offence under S. 19 (f), Arms Act, 1878, in virtue of Sch. 2 to the Act. The decision in that case however does not help the applicants at all. The weapon in that case was a dagger, which cannot be treated as falling under the heading of swords in the table appended to the Government notification. A dagger is an entirely different kind of weapon, and is separately mentioned in S. 4, Arms Act, along with swords. Daggers would therefore fall under item (2) of the table appended to the notification of the Government of Bombay, and not under item (3). Under item (3) the possession as well as the carrying of swords which, in our opinion, includes sword-sticks, is prohibited. On this view of the case the applicants have been rightly convicted. Their application is rejected and the rule discharged.

Murphy, J.—I agree.

K.S. *Rule discharged.*

1. (1907) 34 Cal 749=6 Cr L J 227.
2. AIR 1930 Bom 159=125 I C 717=31 Cr L J 932.

A. I. R. 1933 Bombay 439

BEAUMONT, C. J. AND RANGNEKAR, J.

Ganpat Bhujang Shidhanti and *others* —Plaintiffs—Appellants.

v.

Hanamgouda Shidagauda Patil—Defendant—Respondent.

First Appeal No. 398 of 1927, Decided on 13th October 1932, from decision of Joint First Class Sub-Judge, at Belgaum, in C. S. No. 297 of 1924.

(a) Limitation Act (1908), Art. 135 — For limitation to run mortgagor must have either actual possession or unconditional right to recover possession.

For the purposes of Art. 135 the mortgagor must either have actual possession, or an unconditional right to recover possession from somebody who has in fact got it, and unless and until he has that right time does not start to run. [P 441 C 1]

(b) Limitation Act (1908)—Construction—Meaning which has effect of destroying right to sue before that right has effectively arisen should be avoided.

In construing Acts of limitation, the Courts must always remember that the object of the legislature is to induce people to be active in the assertion of their rights, and to penalise those who sleep upon their rights; and if it is possible to avoid giving a statute of limitation a meaning which has the effect of destroying a right to sue before that right has effectively arisen the Court should do so. [P 441 C 1]

(c) Limitation Act (1908), Art. 135—Prior mortgage with possession – Suit for possession by subsequent mortgagee with possession — Limitation runs from date where mortgagor recovers possession from prior

mortgagee and not date of subsequent mortgage.

In a case where possession is outstanding in a prior mortgagee at the date of a subsequent mortgage, time runs against the subsequent mortgagee from the date when possession is recovered by the mortgagor from the prior mortgagee and not from date of his mortgage : *A I R* 1919 *Lah* 402 and *A I R* 1922 *Lah* 91, *Rel on*: *A I R* 1924 *Oudh* 374, *Diss from*. [P 441 C 2]

(d) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 12 — Dispute about amount of creditor's claim—Burden of proof is on none —Court has to find out facts.

Under S. 12 the Court, if the amount of the creditor's claim is disputed, shall examine both the plaintiff and the defendant as witnesses unless, for reasons to be recorded by it in writing, it deems it unnecessary so to do, and shall inquire into the history and the merits of the case. Hence the burden of proof is upon nobody's shoulders and the Court has to find out the facts. [P 442 C 1]

(e) Mortgage — Mortgage by conditional sale—Mortgagee can claim possession even if suit for foreclosure is time barred.

Per *Rangnekar, J.*—The fact that a suit for foreclosure is time barred does not prevent a mortgagee by conditional sale from maintaining a claim for possession : 16 *Mad* 64, *Ref.* [P 442 C 2]

K. H. Kelkar and *R. A. Jahagirdar*—for Appellants.

Nilkant Atmaram—for Respondent.

Beaumont, C. J.—This is an appeal from the decision of the Joint First Class Subordinate Judge of Belgaum. The plaintiffs sued to obtain a declaration that the defendant was not entitled to redeem the suit property, and they also sued to recover possession of the property as owners from the defendant, and for certain mesne profits. The plaintiffs' title arises under a document of 25th November 1908, which is a mortgage by conditional sale. The learned Subordinate Judge held that the plaintiffs' title was barred by limitation, and he therefore dismissed the suit ; but he raised an issue as to whether the consideration for the document of 25th November was given, and he held that it was, and on that issue he discussed the evidence in some detail. The plaintiffs in this Court say that they will be satisfied by an order for possession, and they do not ask for any declaration that the defendant is not entitled to redeem.

The first point to consider therefore is whether the plaintiffs" suit is barred by limitation ; and for the purposes of that issue the facts can be shortly stated: The suit property originally belonged to a man called Shidagauda, who died some time in 1897, and was succeeded by his widow. In the year 1900 the widow gave a possessory mortgage on the said property to her brother Parappa. The defendant disputes that the document was a mortgage, but he does not dispute that Parappa got possession of the property. In 1907 the widow adopted the present defendant, and she died soon thereafter. On 25th November 1908 the defendant executed the mortgage by conditional sale to which I have referred. That document is Ex. 45. It is made in favour of one Bhujang who was the plaintiffs' father. It is expressed to be a deed of conditional sale, and the defendant stated that he had sold to Bhujang for Rs. 2,000 the suit property. Then it provides as follows :

> "If I repay you Rs. 2,000 (two thousand) borrowed from you on the next day after the expiry of the period of five years from today, you should give (the land) to us by executing sale-deed in our favour."

Then it is stated that the property has been let to one Malappa for cultivation for Rs. 80 for one year, and then the document runs:

> "And hence I have handed over to you the said kabuliyat (i. e., tenancy agreement) . . . According to the terms of the said kabuliyat you are authorised to recover from him the said amount of rent. As soon as the period in the said kabuliyat expires, you should take the said land in your possession. I have duly received the said amount of two thousand rupees in cash paid by you."

So that the document appears on the face of it to be a mortgage by conditional sale with immediate possession given to the purchaser or mortgagee. In fact however possession was not given, because possession was still in the hands of Parappa under the mortgage of 1900. In the year 1917 the defendant recovered possession of the property from Parappa. He denies that he paid anything, but whether he did so or not is, in my view, immaterial. The plaintiffs started this suit on 8th August 1924, and the question is whether time runs against them from 25th November 1908, the date of their mortgage, or from 1917, the date when the mortgagor recovered possession of the suit property from Parappa.

The question turns, in my opinion, on Art. 135, Lim. Act. That article provides that a suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immovable property mortgaged must be brought within 12 years, and then in the third column the date from which the time

runs is this: "When the mortgagor's right to possession determines." That article was in the same terms under the Limitation Act of 1877, but under the previous Act of 1871 the period ran from the time when the mortgagee was first entitled to possession. Whether there is any difference between the provisions of the two Acts is not very clear. Prima facie it would seem that the moment of time at which the mortgagee becomes entitled to possession is the same as the moment when the mortgagor's right to possession determines. However, we are only concerned with the present Act 9 of 1908. There is very little direct authority on this point, and one must deal with it in the first place as a matter of construction. It seems to me that a provision that time is to commence to run when the mortgagor's right to possession determines presupposes that the mortgagor has a right to possession. If he has no right to possession that right cannot determine. Mr. Nilkant Atmaram has argued that the mortgagor had a right to possession in this sense that he had a right to recover possession from Parappa.

But it is not proved in this suit that Parappa was anything else than what he is expressed to be under the document, viz., a mortgagee, and if that is so, the right of the mortgagor to recover possession was only a conditional right, a right to recover possession upon payment of what was due under the mortgage, in other words, a right to redeem, and that right was not determined by execution of the mortgage in favour of Bhujang. In my opinion, for the purposes of Art. 135, the mortgagor must either have actual possession or an unconditional right to recover possession from somebody who has in fact got it, and unless and until he has that right time does not start to run. In construing Acts of limitation the Courts must always remember that the object of the legislature is to induce people to be active in the assertion of their rights, and to penalise those who sleep upon their rights; and if it is possible to avoid giving a statute of limitation a meaning which has the effect of destroying a right to sue before that right has effectively arisen, I think the Court should do so.

With regard to the authorities there is a case from Oudh, *Gokul Prasad* v. *Sukru, A. I. R.* 1924 *Oudh* 374, in which the learned Judicial Commissioner held that in a case where possession is outstanding in a prior mortgagee at the date of a subsequent mortgage, time runs against the subsequent mortgagee from the time of that mortgage, and not from the date when possession is recovered from the prior mortgagee. That view has been dissented from in two cases by the High Court of Lahore, *Budha* v. *Mul Raj* (1) and *Indar Singh* v. *Basanta* (2), and in my judgment the view of the Lahore Court is the correct one. I think therefore that until the mortgagor recovered possession in the year 1917, time did not begin to run against the plaintiffs under their mortgage of 25th November 1908. As soon as possession was recovered from the prior mortgagee then the mortgagor's right to possession as between himself and the plaintiffs determined, but time did not begin to run against the plaintiffs until 1917. I think therefore on the question of limitation the decision of the learned Judge was wrong.

Then the respondent by his cross-objections challenges the finding of the learned Subordinate Judge on the issue as to whether consideration was given for the mortgage of 25th November 1908. The mortgage itself, to which I have referred, states that consideration had been paid before the Sub-Registrar before whom the document was registered. The defendant does not dispute the execution of the document. The document admits that Rs. 500 were received and Rs. 1,500 were paid by the creditor in the presence of the Sub-Registrar. The defendant does not dispute that the document was executed and that Rupees 1,500 were paid to him by Bhujang before the Sub-Registrar. But his story is that the payment of Rs. 1,500 before the Sub-Registrar was merely to induce the Sub-Registrar to believe that the transaction was a genuine one, that in point of fact no money had passed from Bhujang to the defendant, that the document was executed because the defendant anticipated that he would have to indulge in litigation in order to establish his title as the adopted son of

1. A I R 1919 Lah 402=48 I C 916.
2. A I R 1922 Lah 91=63 I C 679.

the late owner of the suit property, that immediately after the execution of the document the sum of Rs. 1,500 was repaid to Bhujang, and that a month or two after the date of the transaction the mortgage itself was handed over by Bhujang to the defendant and was retained by him. Before dealing with the merits of this story I should observe that the defendant is an agriculturist and therefore he falls within the Dekkhan Agriculturists' Relief Act. Under the ordinary law the defendant having admitted by this mortgage that he had received Rs. 2,000, the burden would be upon him of showing that that admission was false and that in fact he did not receive Rs. 2,000. But in the case of persons to whom the Dekkhan Agriculturists' Relief Act applies such general provisions of law do not apply, and under S 12 of the Act

"the Court, if the amount of the creditor's claim is disputed, shall examine both the plaintiff and the defendant as witnesses, unless, for reasons to be recorded by it in writing, it deems it unnecessary so to do, and shall inquire into the history and the merits of the case...."

It is therefore argued by Mr. Nilkant Atmaram that the burden is not on the defendant to prove that the admission was false, and he even suggests that the burden is upon the plaintiffs to prove that Bhujang actually advanced the defendant the moneys. In my opinion under the Act the burden of proof is upon nobody's shoulders. The Court has to find out the facts, and I think the learned Judge has correctly appreciated the position, because he himself called the defendant and examined him as to the facts. Although the burden may not be upon the defendant to prove that the admissions which he made in the mortgage are untrue, nevertheless the fact that he did admit receiving Rs. 2,000 is certainly evidence against him even in an inquiry under the Dekkhan Agriculturists' Relief Act. Mr. Nilkant Atmaram, in support of the defendant's story, relies principally upon these facts. (After examining the facts, his Lordship concluded). In my opinion, we cannot disagree with the finding of fact of the learned Subordinate Judge, but he being wrong in holding that the plaintiffs' suit is barred by limitation, the appeal must be allowed.

Rangnekar, J.—The plaintiffs-appellants brought this suit for a declaration that the defendant was not entitled to redeem the suit property, for possession of the property as owners, and for other reliefs. They rest their claim on a document Ex. 45. The defendant contested the claim on the ground, among others, that the transaction was not one of sale but was a mortgage by conditional sale, that it was a hollow transaction and he had received no consideration for it, and that in any event the suit was barred by limitation. On the facts the learned Subordinate Judge held that the transaction was a mortgage by conditional sale, that Bhujang, the father of the plaintiffs, had paid consideration for the document, and that it was not a hollow transaction as contended by the defendant. But on the question of limitation he held in favour of the defendant, and dismissed the suit.

The plaintiffs appeal on the ground that the learned Judge was wrong in holding that the suit was barred by limitation. The defendant has filed cross-objections to the finding of the learned Judge on the merits. The principal question therefore is whether the learned Judge was right in holding that the plaintiffs' suit was barred under Art. 135, Lim. Act. As stated above, the learned Judge held that the document, Ex. 45, was a mortgage by conditional sale and that the relationship between the plaintiffs and the defendant was that of the mortgagee and the mortgagor. In that opinion I entirely agree, and indeed it has not been disputed before us by the learned counsel on behalf of the respondent.

At the outset I should like to deal with a point which Mr. Nilkant has taken in the course of his able arguments. He says that as the suit was framed, it was a suit for foreclosure and therefore it was barred under Art. 120, Lim. Act, as the mortgage under Ex. 45 was executed in 1908 and the suit was instituted in August 1924. As far as I can see, the point was not raised in the trial Court. Apart from that, it is clear that the suit was framed in this particular manner as the plaintiffs believed and contended that the document in their favour was one of sale. But assuming that the suit was one for foreclosure and further assuming that it was barred when it was instituted, I am unable to see why it is not open to a mortgagee

claiming under a mortgage by conditional sale to maintain the claim for possession. I may in this connection refer to the observations of the learned authors, Shepherd and Brown, in their Commentary on the Transfer of Property Act, at p. 290:

"... on the other hand, the fact that his right to foreclosure is barred does not prevent him from recovering the possession of which he has been deprived: "*Ammanna* v. *Gurumurthi* (3).

Mr. Kelkar for the appellants made his position clear and stated that he would be satisfied with a decree for possession and would not ask for any declaration that the defendant is not entitled to redeem. In view of this and having regard to the conclusion to which we have come on the facts of the case, I do not think that any useful purpose would be served by pursuing this point further, and, speaking for myself, I do not think that this was a foreclosure suit.

On the question of limitation the learned First Class Subordinate Judge held that Art. 135 applied to the facts of the case and time began to run against the mortgagee from the date of the execution of the mortgage deed, that is from November 1908. The question is whether this view is correct. Art. 135 gives a right to a mortgagee to sue for possession within 12 years, and the period of 12 years runs from the time the mortgagor's right to possession determines. Previous to the present Act we had the same article in the Act of 1877. Art. 135 in these two Acts corresponds with Art. 135 in the Act of 1871, but in that Act limitation runs from the time "when the mortgagee is first entitled to possession." In my opinion, the change in the wording of the article in the Act of 1877 and of the present Act has not made any change in the time from which limitation is to run, and, as in the earlier Act, so in the present Act, the terminus a quo is in effect the same. I say so because, when the mortgagee first becomes entitled to possession, the right of the mortgagor to possession ceases and must cease and he can be ejected, and while the mortgagor has a right to possession the mortgagee is not entitled to possession. In my opinion Art. 135 distinctly contemplates that possession must be with the mortgagor before the article would apply and before time would begin to run under the article. Mr. Nilkant relies on a decision of the Oudh Court in *Gokul Prasad* v. *Sukru*, *A. I. R.* 1924 *Oudh* 374. With all respect to the learned Judicial Commissioner who decided that case I am unable to agree with his opinion. The learned Judicial Commissioner relied upon a previous decision of the same Court to the same effect. That earlier decision was dissented from by Shadi Lal, J., as he then was, in *Budha* v. *Mul Raj* (1), and his judgment was followed by a Division Bench in a later case, *Indar Singh* v. *Basanta* (2), consisting of Sir Shadi Lal, C. J., and Moti Sagar, J., I respectfully agree in the view taken by the Lahore High Court. In my opinion a puisne mortgagee is not bound to file a suit for possession within 12 years from the date of the mortgage if the property is not in the possession of the mortgagor but in the possession of a third party or a prior mortgagee.

In this case the facts are that although the mortgage deed, Ex. 45, stated that the mortgagee was to recover possession from the tenant holding the land, it is common ground that the recital is false and that in fact the land was not in the possession of the mortgagor nor of anyone holding under him, but that it was in the possession of Parappa to whom the land was mortgaged with possession by the adoptive mother of the defendant. The defendant obtained possession from Parappa in 1917 and the suit filed in August 1924 would, I think, be in time. I think therefore the view of the learned Judge that the suit is barred is erroneous and the appeal must be allowed. On the cross-objections I desire to say very little. Mr. Nilkant has argued that having regard to the fact that the defendant is an agriculturist the onus was really on the plaintiffs to establish the factum of consideration. I do not think that S. 12, Dekkhan Agriculturists' Relief Act, on which he relies lays down any such proposition. I think the correct procedure in such cases is as laid down in *Maloji Santaji* v. *Vithu Hari* (4). Under S. 12, Dekkhan Agriculturist's Relief Act, the question is not so much of the onus, but it is the duty

3. (1892) 16 Mad 64=2 M L J 155.

4. (1885) 9 Bom 520.

of the Court to hear both the plaintiff and the defendant if the defendant happens to be an agriculturist and to satisfy itself that the transaction is free from any of the defects mentioned in that section. This the Court has done, and merely because there are certain circumstances which Mr. Nilkant has rightly stressed as supporting his case, speaking for myself, I am not prepared to interfere on a question which essentially was a question of fact to be determined by the Judge of first instance.

Per Curiam:—We hold the plaintiffs entitled to possession, but we think, under the circumstances of this case, we ought to exercise the powers given to us by S. 15-C, Dekkhan Agriculturists' Relief Act, and give the defendant an opportunity of paying the mortgage debt by instalments. We think, following the decision of the Privy Council in *Narain Singh* v. *Shimbhoo Singh* (5), the plaintiffs are not entitled to interest before the decree. The final order therefore will be: The appeal is allowed with costs and the defendant to pay the plaintiffs the amount due on the mortgage, which is admitted to be Rs. 2,000, with interest at the rate of six per cent. per annum from the date of the decree by annual instalments of Rs. 500 principal together with interest up to date. The first instalment to be paid on 1st June 1933 and the subsequent instalments to be paid on 1st June of each succeeding year. In default of payment of any one instalment the plaintiffs will have liberty to apply to the Court under S. 15-C (2) for an immediate order for possession. Costs of this appeal to be added to the mortgage debt. Cross-objections dismissed with costs.

K.S. *Appeal allowed.*

5. (1876) 1 All 325=4 I A 15 (P C).

A. I. R. 1933 Bombay 444

BEAUMONT, C. J. AND RANGNEKAR, J.

Hirjibhoy Behramji Warden and *others* —Defendants—Appellants.

v.

Ratanbai—Plaintiff—Respondent.

Original Civil Appeal No. 55 of 1932, Decided on 7th March 1933, from decision of Wadia, J., in Suit No. 137 of 1932.

Negotiable Instruments Act (1881), S. 29— Liability must be expressly limited.

Under S. 29, the liability should be expressly limited and not merely impliedly. A promissory note was headed "Estate of late Mr. B. H. Warden." It was executed by the defendants who were described as executors of the estate and it was signed by them as "Executors of the estate of the late B. H. Warden:"

Held: that there was no express limitation of liability to the extent of the assets received by the defendants as executors and that they were personally liable under it. [P 445 C 1]

Jamshed Kanga—for Appellants.

K. S. Shavaksha—for Respondent.

Beaumont, C. J.—This is an appeal from a decision of Wadia, J., and the short point which arises is whether on a promissory note, Ex. A, the gentlemen who signed that note are personally liable or whether they are liable only as executors of their deceased father. It is not disputed that the father, Behramji, had given a promissory note for Rupees 17,000 to one Screwvala. Behramji died in 1924 and the present appellants are his executors. After his death Rs. 1,000 was paid off and two promissory notes of Rs. 8,000 each were given to secure the balance of the debt. That was in 1926. On 29th January 1929 the promissory note in suit was given by way of renewal of one of those promissory notes for Rs. 8,000 and it is clear that the consideration to be implied would be the giving of time. Indeed on the plaintiff's own evidence that was in fact the consideration. Now the promissory note is in these terms: It is headed "Estate of late Mr. Behramji H. Warden" and then it says:

"We, the undersigned, executors of the estate of the late Mr. Behramji Hirjibhoy Warden, promise to pay on demand to Mr. Dossabhoy Dhanjibhoy Screwvala or Bai Ratanbai Nowroji Surti or any one of them or survivor or order the sum of Rs. 8,000 with interest at the rate of ten annas per cent per month for value received in cash."

And then it is signed by one of the executors for self and as the constituted attorney of two of the other executors, and the fourth executor also has signed. Then at the bottom come these words: "Executors of the Estate of the late Mr. Behramji Hirjibhoy Warden." If the case arose under S. 26, Bill of Exchange Act in England, it would, I think, be an arguable point whether the promissory note was given by the executors in their representative capacity or whether it was given by them personally with a mere description of their character as executors. But in India the case is governed by S. 29, Negotiable Instruments Act. That section says:

"A legal representative of a deceased person, who signs his name to a promissory note, bill of exchange, or cheque, is liable personally thereon, unless he expressly limits his liability to the extent of the assets received by him as such."

It is, in my opinion, impossible to argue that this note expressly limits the liability to the extent of the assets received by the promisors as executors. The very highest it can be put is that there is an implied limit, but the section requires an express limit. No doubt that limit might be expressed in various ways, but it must be expressed in some form or other. I think the judgment of the learned Judge was quite right and that the appeal must be dismissed with costs.

Rangnekar, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1933 Bombay 445

PATKAR, J.

Nagasi Ukheda Gujjar and *others*—Defendants—Appellants.

v.

Anandji Dharsi Gujjar—Plaintiff—Respondent.

Second Appeal No. 281 of 1930, Decided on 10th March 1933, from decision of First Class Addl. Sub-Judge, Dharwar, in Appeal No. 174 of 1929.

(a) Will—Construction—Intention of testator must be gathered from terms of will read as whole—Decision in construction of other wills is not of much assistance.

In construing a will the intention of the testator must be gathered from the terms of the will then before the Court, reading it as a whole, and not much assistance is derived from previous decisions on the construction of other wills, where the language was different from that of the will under consideration: *A I R* 1930 *P C* 239; *A I R* 1930 *P C* 253; 24 *W R* 395 and 30 *All* 84 (*PC*), *Ref.* [P 446 C 2]

(b) Will—Construction—Joint bequest to son and wife in proportion of 3 to 1—Wife takes absolute estate like the son.

A testator directed that certain property should be enjoyed by his mother during her lifetime and that after her death his son and wife should enjoy it. It further provided that 12 annas out of it should be given to his son and 4 annas to his wife:

Held: that the bequest to the son and wife was made in the same words and that the wife also took an absolute estate like the son. [P 446 C 1]

S. B. Jathar—for Appellants.

M. R. Jayakar and *G. P. Murdeshwar*—for Respondent.

Judgment.—The plaintiff in this case sued for a declaration that he was the owner of the movable property in suit and for an injunction restraining defendants 1 and 2 from recovering the property and for recovery of possession of the property or the price thereof from defendants 1, 2 and 3. It appears that one Dharsee Thackersey Gujar died on 13th November 1915, leaving behind him a son, the plaintiff, a widow Ratanbai or Bayabai, his mother and a daughter. He was possessed of movable and immovable properties and had considerable debts. He made a will, Ex. 77, on 13th November 1915, bequeathing his property and appointing panchas. He directed that his movable and immovable property at Cutch Varadia should be enjoyed by his mother during her lifetime, and after her death his wife and son Anandji should enjoy this property and that after referring to certain other properties he directed as follows:

"If in future Anandji and my wife do not pull on well together, twelve annas out of my property should be given to Anandji and four annas out of my property should be given to my wife."

The question in the present case is whether the property, which was divided between Anandji, the son, and the wife, by the panchas after the death of Dharsee, was absolute property or was a limited estate of a Hindu widow. It appears that the panchas co-opted three other persons in order to wind up the affairs of the deceased Dharsee. They settled with the creditors of Dharsee and paid them a portion of the debts, consolidated the moveable and immovable property, and divided the property between Anandji and his stepmother in the proportion of 3 to 1. The learned Subordinate Judge held that the property which came to the widow was absolute property, and that the conduct of the panchas and the plaintiff's own conduct in Ex. 24 supported the inference that the property which the widow obtained was absolute property. The case before the Subordinate Judge was that the property was given to the widow on the express condition that it was for her maintenance, and witnesses, Exs. 94 and 96, were examined on behalf of the plaintiff. The learned Subordinate Judge disbelieved those witnesses and came to the conclusion that the interest which was obtained by the stepmother was an absolute estate.

When the case came up to the lower appellate Court, the learned Additional First Class Subordinate Judge held that the question depended upon the con_

struction of the will, and the method by which the property was divided by the panchas after the death of Dharsee was not conclusive as to the nature of the property which was given to the stepmother and the plaintiff in the proportion of 1 to 3. The question reduces itself into this: whether according to the terms of the will Ratanbai took an absolute estate in the property which was allotted to her. The material words in the will are :

"If in future Anandji and my wife do not pull on well together, 12 annas out of my property should be given to Anandji and 4 annas out of my property should be given to my wife."

The words of bequest are the same in so far as the bequest to the son is concerned, and also the wife is concerned, and it is difficult to hold that the bequest in favour of the son is an absolute bequest, and that in favour of the wife is a limited estate, unless it is held that a bequest to the wife must necessarily be a limited estate. Where there is a joint bequest to a wife and to a son it is difficult to differentiate between the nature of the estate given to the son and the nature of the estate given to the wife. Reliance is placed on behalf of the respondent on the decision in the case of *Hirabai* v. *Lakshmibai* (1). In that case the property was given to the widow and the adopted son with a direction that they should maintain themselves out of the income. There is a similar provision in the initial portion of the will, but subsequently, after reference to other matters, the testator directed the property to be divided between the son and his own wife in the proportion of 3 to 1. The question therefore is whether under these circumstances the son would take an absolute estate and the wife would take a limited estate. It is very difficult to construe one will in accordance with the construction put by other Courts on the provisions of another will. If there are clear words like "Malik" or "from generation to generation" in the case of a gift made to a wife, it would necessarily invest the wife with the full proprietary right, and it would not be necessary further to give her any power of alienation. The question is whether in the absence of such clear words the gift to a wife must necessarily be held to be a gift of a limited estate.

1. (1887) 11 Bom 573.

In *Shalig Ram* v. *Charanjit Lal* (2) it was held that in construing a will the intention of the testator must be gathered from the terms of the will then before the Court, reading it as a whole, and not much assistance is derived from previous decisions on the construction of other wills, where the language was different from that of the will under consideration. At p. 1585 of 32 *Bom. L. R.*, it was observed as follows:

"It is, however desirable to observe that at one time it was held by some of the Courts in India that, under the Hindu law, in the case of immovable property given or devised by a husband to his wife, the wife had no power to alienate unless the power of alienation was conferred upon her in express terms. It has been held by decisions of this Board that that proposition was not sound, and that 'If words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended'."

In *Jagmohan Singh* v. *Sri Nath* (3), it was observed as follows (p. 1611 of 32 *Bom. L. R.*):

"If, as in the present case, the donor does not confer upon the lady express power of alienation, such power may nevertheless be deduced from the terms of the gift if the words used are sufficient to confer upon her absolute ownership, unless the circumstances or the context show that such absolute ownership was not intended. There is, their Lordships think, no magic in the use of any particular word or form of words; the document must be construed as a whole, and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out with no reservation, the right of alienation will be included just as much as any of the other incidents of ownership, and just as much where the gift is to a female as where it is to a male."

I may in this connexion refer to the decision of Mitter, J., in *Mt. Kollany Kooer* v. *Luchmee Pershad* (4), approved by the Privy Council in *Surajmani* v. *Rabi Nath Ojha* (5). I have read carefully the terms of this will and I cannot find any reason to differentiate between the bequest made to the son and the bequest made to the wife, and if the bequest made to the son is absolute there are no circumstances in the case and there are no other clauses in the will which would cut down the absolute interest in favour of the wife. It appears

2. A I R 1930 P C 239=128 I C 265=11 Lah 645=57 I A 282=32 Bom L R 1578 (PC).
3. A I R 1930 P C 253=128 I C 270=57 I A 29 =32 Bom L R 1609 (PC).
4. (1875) 24 W R 395.
5. (1907) 30 All 84=35 I A 17=5 A L J 67 (PC).

clear from the will that the testator knew the appropriate language to be used for giving a life estate when he dealt with the properties in Cutch and gave a life estate to his mother. It is clear from the terms of the will and surrounding circumstances that the testator intended to give an absolute interest in the property to his wife. I think, therefore, that the view taken by the learned Subordinate Judge is right and the view taken by the lower appellate Court is not correct. The view which I take is consistent also with the subsequent events. The panchas who distributed the property, according to the view of the learned Subordinate Judge, intended that the property should be given to the wife as absolute property. The plaintiff also, in his notice, Ex. 24, stated that he claimed the property as heir of Ratanbai. It would therefore follow that he considered Ratanbai as the owner of the property. I think therefore that the decree of the lower appellate Court should be reversed and that of the Subordinate Judge restored with costs of this Court and of the lower appellate Court on respondent 1.

K.S. *Decree reversed.*

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* A. I R. 1933 Bombay 447

BAKER, AG. C. J. AND DIVATIA, J.

Ochhavlal Bhikhabhai In re

Criminal Appln. Revn. No. 119 of 1933, Decided on 11th July 1933, against order of District Magistrate, Khaira.

*** Criminal P. C. (1898), Ss 235 (1), 236, 237 and 403 (1)—S. 403 (1) will not operate in cases covered by S. 235 (1) — Conviction for conspiracy—Acts of cheating committed in pursuance of the conspiracy—S 403 is no bar to subsequent trial for cheating — Penal Code (1860), S. 120-B.**

Section 403 (1) will operate in cases covered by Ss. 236 and 237, but will not operate in cases covered by S. 235, sub-S. (1). [P 448 C 1]

Accused were convicted for an offence of criminal conspiracy ; but they were not charged with or convicted of the individual acts of cheating which took place in pursuance of the conspiracy. Those individual acts were mentioned in the charge as overt acts which were necessary in order to prove the offence of criminal conspiracy :

Held : that S. 403 (1) was no bar to their subsequent trial for the offence of cheating : 42 *Cal* 957 ; 26 *I C* 307 ; 42 *Cal* 1153 and *AIR* 1929 *Bom* 128, *Ref.* [P 449 C 1]

V. N. Chhatrapati for *B. G. Thakor* — for Petitioners.

B. G. Rao —for the Crown.

Baker, Ag. C. J.—The petitioners apply for revision of the order passed by the District Magistrate of Kaira setting aside the order of discharge and directing further inquiry against them for offences under Ss. 420, 114 and 120-B, I. P. C., they having been originally discharged of the same offences by the Resident Magistrate First Class, Nadiad. The facts are that in the year 1926 there were a large number of cases of cheating by representing that it is possible to duplicate currency notes, committed in the Kaira, Panch Mahals and other districts, and it was found that these offences were being committed by a gang of which the present applicants were members.

The applicants along with others were committed to the Court of Session at Godhra by the First Class Magistrate of Godhra on a charge under S. 120-B, I. P. C., and in that charge are set out a number of specific instances of cheating various persons committed by the members of this gang. Amongst these appears the name of one Somnath Motiram of Dakore. The accused including the present applicants pleaded guilty in the Sessions Court. They were convicted and sentenced to various terms of imprisonment and fine by the Sessions Judge of Panch Mahals in April 1932. But thereafter the present applicants were prosecuted for the offences under Ss. 420, 114 and 120-B, I. P. C., in respect of cheating Somnath Motiram of Dakore by representing to him that they would duplicate currency notes and thereby inducing him to deliver currency notes to them. The case came before the Resident Magistrate of Nadiad, and he was of opinion that the accused having been previously tried and convicted by the Sessions Court at Godhra in respect of the act which was the subject-matter of the case before him, S. 403, Criminal P. C., was a bar to the trial, and he therefore discharged accused 1 Ochhavlal Bhikhabhai, and No. 2 Sankalchand Maganlal under S. 403. Against this order a revision application was made by the Crown to the District Magistrate of Kaira, who, under S. 436, Criminal P. C., ordered further inquiry into the matter, being of opinion that S. 403 was not a bar to the trial. Against this order the applicants have made the present application for revision. The

point is one of some importance, but there is some authority on it. S. 403, Criminal P. C., says :

"(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237. (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub-S. (1)."

The remaining clauses of the section are not material to our purpose. It will appear therefore that S. 403 (1) will operate in cases covered by Ss. 236 and 237, but will not operate in cases covered by S. 235, sub-S. (1). S. 236 refers to cases where it is doubtful what offence has been committed, and therefore does not apply, and S. 237 refers to cases where a person is charged with one offence and can be convicted of another. That also has no application. S. 235, sub-S. (1), says :

"If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence."

The question that will arise therefore is whether the criminal conspiracy and the actual acts of cheating were so connected together as to form the same transaction in which more offences than one were committed by the accused and whether they might have been charged with and tried at one trial for such offences. It might be noted that the charge in the Sessions Court for which they were convicted was under S. 120-B, viz. criminal conspiracy, and that they were not charged with or convicted of the individual acts of cheating which took place in pursuance of the conspiracy. Those individual acts are mentioned in the charge as overt acts which are necessary in order to prove the offence of criminal conspiracy. Now, there is authority for holding that in cases of this character, where in pursuance of the criminal conspiracy certain acts are done by the persons taking part in the conspiracy, those acts form part of the same transaction, and under S. 235 (1) the accused may be charged with and tried at one trial for such offences. It is, of course, clear in the present case that they were not charged with those offences nor tried for them. The cases are mostly of the Calcutta High Court. In *Amrita Lal Hazra* v. *Emperor* (1) the illustration given is precisely the one with which we are concerned in the present case. The Court said (p. 983) :

"To take one illustration: A and B conspire to cheat X; in pursuance of that conspiracy and in fulfilment of its object, A cheats X on a specific occasion. The position may clearly be maintained that the two different offences of conspiracy to cheat committed by A and B, and the offence of cheating committed by A alone, have been committed in the same transaction."

And reference is made to two other cases of the Calcutta High Court, *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Monmohan* (2) and *Harsha Nath Chatterjee* v. *Emperor* (3). In this latter case, *Harsha Nath Chatterjee* v. *Emperor* (3), it was held that a charge of criminal conspiracy to manufacture arms, under S. 120-B, I. P. C., read with S. 19 (a), Arms Act, may be tried jointly with charges of offences under Ss. 19 (f) and 20 of the latter Act committed in pursuance of the object of the conspiracy, and that as long as the conspiracy continues the transaction which began with the forming of the common intention continues, and the offences under Ss. 19 (f) and 20, Arms Act, are committed in the course of the same transaction. That case was followed by this Court in *Emperor* v. *Gopal Raghunath* (4), a judgment to which I was a party. That was a case of counterfeiting, and at p. 151 (of 31 *Bom. L. R.*) it is stated that

"the separate act done by any of the conspirators in pursuance of that conspiracy could be joined in the same trial."

Applying these principles it would be seen that the offences committed by various members of the conspiracy in pursuance of the object of the conspiracy are offences separate from the commission of the conspiracy, which is under S. 120-B, and could have been separately charged and tried under S. 235 (1) at the same trial. This being the law, it is quite clear on the record in this case that the offence of conspiracy under S. 120-B was the only offence charged against the accused and was the offence

1. (1915) 42 Cal 957=29 I C 513=16 Cr L J 497.
2. (1915) 26 I C 307=16 Cr L J 3.
3. (1915) 42 Cal 1153=26 I C 313=16 Cr L J 9.
4. AIR 1929 Bom 128=116 I C 243=30 Cr L J 588=53 Bom 344=31 Bom L R 148.

of which they were convicted, and the separate offences of cheating committed by them in pursuance of that conspiracy were not made the subject of the charge, nor were they charged with or tried for them under S. 235, sub S. (1). This being so, S. 403 (1) has no application, but the case is governed by S. 403, sub-S. (2), which says :

> "A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub S. (1)."

The accused have not been tried for the offence of cheating at Dakore, and therefore S. 403 is no bar to their trial for that alleged offence. It has been further argued that there was an agreement between the Police Inspector, who was instructing the prosecution, and the defence that the accused having pleaded guilty at the trial in the Sessions Court at Godhra, no further proceedings should be taken against them in respect of the offence committed in pursuance of the criminal conspiracy. But apart from there being no record of that agreement, it is not such an agreement as can be enforced by this Court. In these circumstances the view taken by the learned District Magistrate, which is expressed at p. 10 of his judgment, appears to be correct. He says :

> "I feel that the mere mention of this incident at Dakore in no way amounts to the offence of cheating at Dakore being tried at Panch Mahals. As I read S. 120-B the case at Panch Mahals before the Sessions was under S. 120-B and was covered by Cl. (1), S. 120-A. . . I cannot by any stretch of imagination see that mere mention of this Dakore incident was tantamount to their being tried for the Dakore offence and for which they came to be convicted."

In these circumstances, we see no reason for interference and the rule will be discharged.

Divatia, J.—This case raises a somewhat important point relating to a trial for an offence after a previous conviction for the offence of conspiracy in which the former offence was treated as one out of the several acts going to prove the conspiracy. The previous conviction in this case has been a conviction for the substantive offence of conspiracy under S. 120-B, I. P. C., alone. There was no trial and there was no conviction for any of the acts, which may amount to an offence, forming part of the conspiracy. In fact, the act which constitutes the present offence had been treated only as an overt act which was evidence of an agreement to do an illegal act within the meaning of S. 120-A, I. P. C. Now, the conviction for this conspiracy alone cannot, I think, be regarded as a bar to a conviction in future for an act, which, although it may be regarded as merely an overt act, in so far as it was one out of the several acts which went to prove the conspiracy, was none the less a separate offence under the Penal Code. S. 403, Criminal P. C., states in sub-S. (2) that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under S. 235, sub S (1). Now, it is clear on the authorities that the offence of conspiracy and the offence of cheating in this case, which was one of the acts in proof of the offence of conspiracy, may be tried together jointly under sub-S. (1), S. 235, Criminal P. C.

That being so, under sub-S. (2), S. 403, Criminal P. C., the previous conviction for the offence of criminal conspiracy cannot be a bar to a subsequent conviction for the offence of cheating. It cannot be said that merely because this act of cheating was considered in the previous case, and the Court came to the conclusion that there was a criminal conspiracy because this act of cheating was one of the acts which was evidence of the conspiracy, therefore the accused have been previously convicted either impliedly or expressly for the offence of cheating itself ; nor can it be said that if the prosecution was with regard to one of the offences which formed part of one transaction therefore subsequently there could be no prosecution for any other offence or offences which formed part of the same transaction. Under S. 235, sub-S. (1), it is open to the prosecution to charge a person with one of the offences and subsequently to charge him with another, although both of them form part of one and the same transaction. Therefore, I think in this case the learned District Magistrate is right in holding that the plea of the accused of previous convictions cannot avail them and that therefore the trial is not vitiated by any infringement of the statutory provisions of S. 403, Criminal P. C.

K.S. *Rule discharged.*

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BEAUMONT, C. J. AND RANGNEKAR, J.

Karsondas Dhunjibhoy — Defendants —Appellants.

v.

Surajbhan Ramrijpal and *others* — Plaintiffs—Respondents.

Original Civil Jurisdiction Appeal No. 50 of 1932, Decided on 22nd March 1933, from order of Kania, J., D/- 21st July 1932, in Suit No. 1598 of 1928.

(a) Civil P. C. (1908), O. 6, R. 17—Leave to amend plaint should not ordinarily be granted if opposite party is deprived of acquired right.

In the absence of special circumstances leave to amend ought not to be given where the effect of the amendment is to deprive the opposing party of an acquired right. [P 451 C 1]

(b) Limitation Act (1908), Art. 85 — For applicability of Art. 85 plaintiff must sue on balance due on mutual, open and current account—If account is not open on date of suit Art. 85 will not apply.

In determining whether a suit falls within Art. 85, the first question to be decided is whether there was at any time a mutual, open and current account between the parties, and if so, when it was closed. In order to bring himself within Art. 85 a plaintiff must show that he is suing for the balance due on a mutual, open and current account. If, in fact, at the date when he starts the suit there is no open account, then he cannot say that he is suing for the balance due on such an account: *AIR* 1922 *Lah* 182, *Rel on*; 5 *CLR* 211, *not Foll.* [P 451 C 2; P 452 C 1]

(c) Limitation Act (1908), S. 14—Cause of action in both suits must be same.

One of the conditions which must be complied with in order that S. 14 may operate is that the cause of action in both the suits must be the same. [P 452 C 2]

*** (d) Limitation Act (1908), Art. 85 — Whether account is mutual, open and current is question of fact depending on nature of dealings and real intention of parties inferrable from surrounding circumstances—Real test is whether dealings are of such a nature that balance might shift from one party to another.**

Per *Rangnekar, J.*—Whether an account is mutual, open and current so as to attract the application of Art. 85 is a pure question of fact and must depend upon the nature of the dealings between the parties, nature of the entries and other relevant circumstances. In order that an account should be mutual there must be dealings between the parties and such dealings must be capable of giving rise to independent obligations on each side of the account at any given period or stage. One test commonly applied is the possibility of shifting balances sometimes in favour of one party and sometimes in favour of the other. But that test is not decisive or conclusive of the matter. The real test is whether the dealings between the parties are of such a nature that the balance might so shift. An account current means a running account, that is an account which is continued and not stopped or closed. If the account is running, that is to say, if it is unclosed, then it is open and current. It is open either because the balance remains to be drawn or struck, or because it is to be carried forward because of some contemplated future dealings between the parties. If the account is not closed by settlement or otherwise, it is open. Of course mere cessation of the dealings between the parties does not mean that the account is closed. The real question in each case would be what is the intention of the parties, and that must be inferred from the surrounding circumstances, [P 455 C 1]

(e) Limitation Act (1908), Art. 89—Suit by principal against agent for accounts and for money that may be found due is governed by Art. 89—Limitation starts when account is demanded or agency terminates.

Article 89 applies to a suit by a principal against his agent for an account and for any money that may be found due on the taking of such account. The starting point of limitation is: (1) when the account is demanded and refused, or (2) when the agency terminates. [P 457 C 1]

Jamshed Kanga and *Chimanlal Setalvad*—for Appellants.

M. C. Setalvad—for Respondents.

Beaumont, C. J.—This is an appeal from a decision of Kania, J. The plaintiffs are suing the defendants as their agents in respect of moneys due on account of various transactions of cotton, wheat, linseed, etc., in Bombay, for about two years up to 20th October 1922, and they ask for an account of those dealings and payment of the amount due to them. In the alternative they ask for payment of Rs. 2,865 odd on an admission which is alleged to have been made by the defendants. The defence is that the plaintiffs' suit is barred by limitation; and that being so, it is necessary to state the relevant dates.

The first dealing between the parties took place on 1st August 1921. There was no general agency agreement, and I think that in law the defendants were appointed as agents for the plaintiffs in respect of each particular transaction committed to them. The last dealing between the parties took place on 4th April 1922, and, in my opinion, till about that date there was a mutual, open and current account between the parties. On 10th July 1922, the defendants wrote to the plaintiffs a letter sending them an account showing the amount due from the defendants to the plaintiffs as Rs. 2,123 odd, and they stated that they had settled that amount by a hawala entry in favour of another shop, in which they alleged the plaintiffs were partners. To that letter the plaintiffs replied on

16th July saying that they did not admit the accuracy of the account, and they also challenged the right of the defendants to settle the account by means of the hawala entry, and they stated that the money due must be paid to themselves. After some further correspondence, on 28th July the defendants wrote saying that they would send the moneys due, viz., Rs. 2,123 odd, to the plaintiffs, and they further contended in the correspondence that the accounts were correct. On 13th July 1925 the plaintiffs commenced a suit in the Subordinate Judge's Court at Delhi claiming the moneys due from the defendants, and that suit finally terminated on 3rd May 1928, by its dismissal for want of jurisdiction. Then on 25th July 1928 the present suit was filed.

The plaintiffs' case is that the moneys which they sue for are due on a mutual, open and current account within Art. 85, Lim. Act, 1908, that the last item in that account was in April 1922, and that accordingly time runs from the end of the year according to the account. It is not in dispute that the end of the year according to the account was in October. So that the plaintiffs' claim is that time began to run from October 1922. Then they say that credit must be given to them under S. 14, Lim. Act, 1908, for the time spent in prosecuting the Delhi suit, and on that basis their suit is in time. The learned Judge accepted that view and gave judgment for the plaintiffs.

I may observe in passing that in the course of the trial the learned Judge gave the plaintiffs leave to amend the plaint by alleging that the account of the plaintiffs with the defendants was a mutual, open and current account, and he says that this amendment was allowed because the point raised was merely one of law. In my opinion that amendment ought not to have been allowed, because on the assumption that it was not open to the plaintiffs on the plaint as drawn to raise the case of mutual, open and current account, the plaintiffs' claim was undoubtedly barred by limitation; and it is settled that in the absence of special circumstances leave to amend ought not to be given where the effect of the amendment is to deprive the opposing party of an acquired right. But I agree with the contention of Mr. Setalvad for the plaintiffs that the amendment was not necessary, and that on the plaint as drawn it is open to the plaintiffs to allege that the moneys are due upon a mutual, open and current account.

The case of the defendants is that the account was closed at any rate on 28th July 1922, and that time began to run from that date at the latest, and that accordingly the suit was out of time even if credit be given for the period of prosecution of the Delhi suit; but they contend further that credit should not be given in respect of the Delhi suit, because they say that the suit was not prosecuted bona fide and that it was not in respect of the same cause of action, and that therefore the conditions necessary to bring the case within S. 14, Lim. Act, 1908, were not fulfilled.

In determining whether the suit falls within Art. 85, the first question to be decided is whether there was at any time a mutual, open and current account between the parties, and if so, when it was closed. As I have already said I think that at any rate down to April 1922 there was a mutual, open and current account between the parties, but, there being no general agency agreement, it would only remain an open and current account with the consent of both the parties. Whether that consent was withdrawn or not at any particular time is a question of fact. In my opinion the fact that all dealings between the parties ceased from April 1922, coupled with the fact that in the following July the defendants sent in an account showing the amount due and made an unconditional offer to pay that amount, shows that it was the intention of the defendants to close the account, and I hold as a matter of fact that the account was closed at any rate from 28th July 1922. The learned Judge thought that the account remained open because two additions were made to the amount credited to the plaintiffs at a subsequent date. But those additions were not in respect of any new matter; they were in respect of matters which but for a mistake would have been included in the original account, and it seems to me that by merely correcting two items in an account it cannot be said that the defendants intended to re-open the account as a current account.

Mr. Setalvad has argued that even if the account was closed at the end of July

1922 he still comes within Art. 85, because he says his suit is a suit to recover moneys which during the current year were due upon a mutual, open and current account and that therefore he gets till the end of the year in which to bring his suit, and for that proposition he refers to a decision of the Calcutta High Court in *Gonesh Lal* v. *Sheo Golam Singh* (1). In that case the plaint was filed on 6th December 1877, and the District Judge had held that the account, which had been a mutual, open and current one, was closed on 25th October 1877, and accordingly he held that Art. 85 did not apply. But this decision was reversed by the High Court, who held that on the District Judge's own finding, namely, that there had been a mutual, open and current account which had been closed before the suit was brought but during the current year, the suit was in time; and the learned Judges of the High Court professed themselves as unable to follow the reasoning of the District Judge. With all respect to the learned Judges it seems to me that the learned District Judge was quite right. The nature of the cause of action must be determined at the date when the action is brought. In order to bring himself within Art. 85 a plaintiff must show that he is suing for the balance due on a mutual, open and current account. If in fact at the date when he starts the suit there is no open account, then he cannot say that he is suing for the balance due on such an account. And it seems to me irrelevant to observe that if the suit had been brought somewhat earlier in the year it would then have been for the balance due on an open account. I am not therefore prepared to follow the decision in *Gonesh Lal* v. *Sheo Golam Singh* (1), and I observe that the Lahore High Court in *Gurdas Ram-Kotu Ram* v. *Bhagwan Das* (2) took the same view of Art. 85 as I am taking. In my view therefore the case does not fall within Art. 85, and having regard to the decisions which have been given as to the meaning of "movable property" in Art. 89, I think the case falls within that article, and that the plaintiffs' suit would be out of time even if credit be given for the period spent in prosecuting the Delhi suit.

1. (1879) 5 C L R 211
2. AIR 1922 Lah 182=68 I C 815.

I am not however prepared to agree with the learned Judge's view that the period spent in prosecuting the Delhi suit should be allowed to the plaintiffs. I am not impressed with the argument that the Delhi suit was not a bona fide one, but I think the plaintiffs have failed to prove that the cause of action in this suit and the cause of action in the Delhi suit were the same, and that is one of the conditions which must be complied with in order that S. 14, Lim. Act, may operate. The plaintiffs did not give evidence either in the Delhi suit or in this suit, and therefore one can only judge the relative causes of action by comparing the plaints in the two suits. In the present suit the claim is in respect of cotton, wheat, linseed, etc., up to 20th October 1922, and in the alternative in respect of an admission. In the Delhi suit the claim is in respect of transactions in cotton only and no period is assigned during which transactions are alleged to have taken place. The plaint in the Delhi suit was filed on 1st July 1925, and there is nothing whatever to show that the transactions covered in that suit would not include transactions in the years 1923 and 1924, which are outside the scope of the present suit. There is an allegation in the plaint in the Delhi suit that the cause of action arose in the month of June, the year not being specified, and that allegation seems inconsistent with the theory that the cause of action in that suit is the same as the cause of action in this suit, because there is no suggestion in this suit that the cause of action arose in the month of June in any year. I think therefore the plaintiffs have failed to prove that the causes of action in the two suits are the same. Mr. Setalvad has relied on an admission made by one of the members of the defendant firm in this suit in the course of his cross-examination to the effect that in respect of cotton transactions of the plaintiffs there was only one continuous account in the defendants' books and there was no other transaction with the plaintiffs. That may have been the defendants' view in 1932, but it does not follow that it was the plaintiffs' view in 1925. With regard to the claim on the alleged admission on which the learned Judge was against the plaintiffs, I agree with his decision and have nothing to add on this

point. For these reasons I think the plaintiffs' suit is barred by limitation, and the appeal must be allowed with costs and the suit dismissed with costs including the costs of the summons. Defendants must pay the costs of the commission, which appears to me to have been entirely unnecessary.

Rangnekar, J.—This is an appeal from a judgment of Kania, J., awarding the plaintiffs' claim in the suit. The main question in the appeal is whether the suit is barred by limitation. The learned Judge held that it was not, and the appellants contended it is. The material facts and the dates are not in dispute. The plaintiffs carry on business in Delhi, and in August 1921 they employed the defendants as their commission agents in Bombay to enter into various transactions in cotton and other commodities. The defendants accordingly bought and sold cotton on their behalf from August 1921 vaida. The business continued up to April 1922 vaida, and admittedly that was the last transaction in cotton that was entered into by the defendants on behalf of the plaintiffs. Somewhere between April and May the defendants made up the accounts and struck a balance of Rs. 2,123 odd in favour of the plaintiffs. It appears that in March 1922, that is after the transaction of April vadia was entered into, the defendants intimated to the plaintiffs that they were not willing to continue business dealings with them. This appears from a letter dated 7th March 1922. In reply the plaintiffs stated that they were giving up cotton business and promised to make up accounts on receiving a statement of account from the defendants. On 10th July the defendants wrote to the effect that Rs. 2,123 odd were due to the plaintiffs and along with that letter sent a full statement of account. They further stated that they had entered a hawala in respect of this sum in favour of the firm of Maheshdas in which according to them the plaintiffs were partners or otherwise interested. The Ankda showed the transactions entered into right from the beginning of August 1921, and it is common ground that up to this time no detailed statement of account was sent by the defendants to the plaintiffs. The Ankda at the foot of it showed the sum of Rs. 2,123-14-9 as "balance payable."

In their letter of 16th July the plaintiffs repudiated the hawala and called upon the defendants to furnish particulars or a detailed statement of their account with them, and further stated that they would recover what was found due to them directly from the defendants. On 21st July 1922 the defendants stated that the Ankda sent was correct and asked the plaintiffs to compare it with the slips they had sent from time to time and that nothing further could be done in the matter. On 20th July the plaintiffs again protested against the hawala and called upon the defendants to give them credit for interest on certain items in the account. On 28th July the defendants wrote to the plaintiffs stating that as the plaintiffs had objected to the hawala entry, they would cancel the same and that they themselves would pay the amount of Rs. 2,123 to the plaintiffs. No further correspondence is alleged to have taken place between the parties.

In 1924 the defendants instituted a suit against the firm of Maheshdas, and in their plaint at para. 4 stated that one of the accounts of the defendants stood in the name of the present plaintiffs, and at the foot of that account the sum of Rs. 2,865 was due. On 13th July 1925 the plaintiffs instituted a suit against the defendants in the Court of the Subordinate Judge at Delhi for recovering, as alleged by the defendants in this suit, the amount due by them at the foot of the commission agency account. The defendants denied the jurisdiction of the Court. The contention was upheld, and the decision confirmed by the appellate Court on appeal by the plaintiffs. The present suit was filed on 30th July 1928. In the plaint the plaintiffs set out two grounds for exemption from the law of limitation : (1) the time taken for prosecution of the Delhi suit and appeal—S. 14, Lim. Act, 1908 ; (2) the admission of the defendants made in their suit against the firm of Maheshdas. It is common ground that the time taken for the prosecution of the Delhi suit and appeal was between 13th July 1925 and 2nd May 1928. As to the second ground of exemption, namely the alleged admission in the suit against the firm of Maheshdas, the learned Judge held that the plaintiffs were not entitled to rely on it. In this view I agree. Almost at

the end of the case the plaintiffs pleaded as an answer to the plea of limitation that the account between the parties was a mutual, open and current account, and applied for an amendment to that effect. The amendment was opposed but allowed by the learned Judge.

The contentions raised by the learned Advocate-General in appeal are: (1) that the plaintiffs are not entitled to rely on S. 14, Lim. Act, 1908, as it is not proved that the cause of action in this suit is the same as that in the Delhi suit, and further that the plaintiffs were not prosecuting the Delhi suit in good faith; (2) that the learned Judge was wrong in allowing amendment of the plaint to the effect that the account between the plaintiffs and the defendants was a mutual, open and current account; (3) that even if the account was mutual, it was not open and current at the end of the year, nor at the date of the suit; and (4) that the case was governed by Art. 89 and not by Art. 85, because the plaintiffs having demanded the accounts the same were refused by the defendants, and, secondly, because the agency between the parties had come to an end in the month of July 1922. Mr. Setalvad for the plaintiffs-respondents in a forcible argument urged: (1) that the cause of action in both the suits is the same; (2) that there is nothing to show that the plaintiffs were not prosecuting their suit in Delhi in good faith; (3) that the amendment was unnecessary and may be ignored as the account in fact is mutual, open and current; (4) that even if the account was closed in July 1922 still the case would be governed by Art. 85 and the plaintiffs would be entitled to bring the suit within three years from the close of the year, that is October 1922 as the last admitted item was entered in the accounts in July 1922; (5) that if Art. 89 applied there was no request to render accounts; and (6) that the agency did not terminate in July as the account was open till the end of the year.

With regard to the first contention as to whether the plaintiffs are entitled to claim exemption from the law of limitation on the ground that they were prosecuting their suit in Delhi, it seems to me that there is considerable force in the argument of the Advocate-General that the cause of action in the present suit is not the same as in the Delhi suit. The Delhi suit was confined only to accounts in respect of cotton transactions and the defendants were sued there as brokers. The suit was filed on 13th July 1925 and the cause of action in the body of the plaint is said to have arisen in June. There is nothing to show what particular month of June the plaintiffs refer to in that plaint, nor is there anything to show that the account in that suit was in respect of the transactions of 1921-22. In the present suit the defendants are sued as commission agents, not only in respect of cotton, but also in respect of various other commodities, such as wheat, linseed, etc., and also in respect of certain dividends recovered by the defendants on behalf of the plaintiffs. The cause of action, according to the plaintiffs, in the present suit arose on 20th October 1922. On these facts it is difficult to hold that the causes of action in both these suits are identical. Assuming however that the plaintiffs are entitled to claim exemption from the law of limitation on the ground mentioned in the plaint the main question in the appeal is whether the account on which the plaintiffs rely is a mutual, open and current account and whether Art. 85 is applicable to the facts of this case. If Art. 85 applies, and if the plaintiffs are entitled to claim credit for period during which they prosecuted the Delhi suit, then it is obvious that the suit would be in time.

Article 85 refers to a suit to recover the balance on a mutual, open and current account between the parties and time begins to run from the close of the year in which the last item admitted or proved is entered in the account. The plaintiffs did not state in the plaint that the account between the parties was mutual, open and current, and almost at the end of the case asked for an amendment to that effect. The amendment was opposed but allowed by the learned Judge. I agree with the learned Advocate-General that the amendment was wrongly allowed, because the effect of it was to deprive the defendants of a right which was vested in them, namely a right to plead limitation. But in my opinion there is considerable force in Mr. Setalvad's argument that the amendment was unnecessary and that the plaintiffs would be entitled to say on the account put in on behalf of the

defendants that it was a mutual, open and current account. The effect of the amendment was only to enable the plaintiffs to plead that the account on which the suit was brought was mutual, open and current, whether successfully or not is a different matter.

Now whether an account is mutual, open and current so as to attract the application of Art. 85 is a pure question of fact and must depend upon the nature of the dealings between the parties, nature of the entries and other relevant circumstances. In order that an account should be mutual there must be dealings between the parties and such dealings must be capable of giving rise to independent obligations on each side of the account at any given period or stage. One test commonly applied is the possibility of shifting balances sometimes in favour of one party and sometimes in favour of the other. But as observed in several reported decisions that test is not decisive or conclusive of the matter. The real test is whether the dealings between the parties are of such a nature that the balance might so shift. An account current means a running account, that is an account which is continued and not stopped or closed. If the account is running, that is to say if it is unclosed, then it is open and current. It is open either because the balance remains to be drawn or struck, or because it is to be carried forward because of some contemplated future dealings between the parties. If the account is not closed by settlement or otherwise it is open. Of course mere cessation of the dealings between the parties does not mean that the account is closed. The real question in each case would be what is the intention of the parties, and that must be inferred from the surrounding circumstances.

Suppose there is a mutual, open and current account between the parties and the dealings close in July and the plaintiffs draw a balance against the defendants and then demand the sum from them intimating that no further dealings will take place between them, I am unable to see how it can be said that after July the account still remained a mutual, open and current account and continued to bear that character right up to the end of the year. There is nothing in law which prevents a party from saying to the other:

"I am closing your account today. This is what is due to you. I shall have nothing to do with you in future."

It is difficult to see how it can be contended after this that the account still remained open and current. On the other hand in the illustration which I have taken, if the transactions between the parties come to an end in July but nothing further happens and at the end of the year the balance is brought down, it is quite clear that the account would be mutual, open and current and limitation would run from the end of the year even though the last item was entered in the month of July. Similarly, if at the end of the year the balance is carried forward, say to the next year, in my opinion there would be nothing to prevent a party from saying that the account was kept open and so on. The real principle, in my opinion, is, as stated by Wood, Edn. 4, p. 1427 :

"The theory upon which the doctrine as to mutual accounts rests is that there is a mutual understanding between the parties, either express or implied, that they will continue to credit each other until one signifies a contrary intention, when the balance being ascertained becomes due and payable."

Applying these principles what is the position? Undoubtedly the account in this case was originally mutual, open and current up to the end of July. But the question would be: Was it open and current after July so as to enable the plaintiffs to say that time in this case should run from the close of the year, that is from October? Now the evidence in the case is so clear on the subject that I have no doubt about the conclusion to which I can come upon it. As I have stated, the defendants sent in the accounts in the month of July. Admittedly no transaction took place after the April vaida. The effect of the correspondence is to show that both the parties mutually were desirous of terminating their business relationship. The defendants actually entered a hawala, that is to say made a payment to the plaintiffs by crediting the sum due to the firm of Maheshdas and debited the amount to the plaintiffs in their own account with them. The hawala was objected to by the plaintiffs and on that objection the defendants stated that they would cancel the hawala and pay the balance directly to the plaintiffs. It

is difficult to see on these facts how the account can be stated to have remained open even up to the end of the year. It is said that the plaintiffs did not accept the balance drawn by the defendants as being correct and that they did not sign any statement of account, and therefore the account was not a stated account. It is further stated that unless an account is stated, that is to say, stated in the same way as, for instance, Art. 64 requires, the account can be said to have been closed. I am unable to accept this argument. I think, as I have stated, the real question is the intention of the parties. I am unable to see there is anything in law which would prevent a man from saying :

> "From today I shall not have any business dealing with you. I have made up my account which according to me is correct, and if you do not accept it, do what you like."

If a man says that clearly nothing further happens, in my opinion the account must be said to have been closed whether the other party accepts the correctness of the account or not.

Then it is said that the account in this case in fact remained open because there were three items which were subsequently either admitted by the defendants or entered in the account books. The evidence with regard to these three items is to this effect: The items are Rs. 209 and Rs. 750 and interest claimed by the defendants on their side of the account. As to the item of Rs. 209 the position is that this sum became due to the plaintiffs in December 1921 as the result of an earlier clearing. It was properly credited in the ledger of the defendants, but in the statement of account sent to the plaintiffs by some oversight the item was omitted. The mistake was due to the fact that there was a similar omission in the entries in the Bethi Khata Vahi from which the Ankda sent to the plaintiffs was prepared, and accordingly credit was given to the plaintiffs at the end of the year. The item of Rs. 750 represents the dividends collected in February 1922 by the defendants on behalf of the plaintiffs. There is no evidence to show that the defendants were employed as agents for this purpose, but apparently they collected the dividends for the plaintiffs in February 1922. This item also was not mentioned in the Ankda sent to the plaintiffs and that was due to an oversight, but it was credited in the ledger at the end of the year as having been recovered by the defendants in February 1922. Then in the Ankda sent to the plaintiffs the defendants forgot to charge interest in their favour, and that omission was subsequently repaired. It however appears that in fact all these three items were mentioned in what is called a memorandum at the end of the cash book. The point to note is that all the items are in respect of matters prior to July 1922. The subsequent addition of these three items in the ledger cannot, in my opinion make any difference in the position and cannot detract from the positive evidence of the account being closed and the dealings having come to an end in July 1922. The test is not whether the account which has been sent to the plaintiffs is correct or not, but the test is whether one party closes the account to the knowledge of the other. It is only when, after the balance is struck, fresh dealings take place between parties, e. g., fresh sum is received or advanced and entered into the account, that it may be said that the account is continued. As a matter of fact these items were brought to account in the cash book and admittedly no fresh dealings took place between the parties after that date.

Mr. Setalvad next argued that the last item in the account was entered in July 1922, and therefore assuming that the account was closed, still time would begin to run under Art. 85 from the close of the year which in this case was October 1922, accounts being kept in accordance with the Indian calendar. Art. 85 states: "For the balance due on a mutual, open and current account," etc. From the wording of the article it is clear that if an account is mutual in any part of the current year, it must retain that character still the end of the year. It cannot retain that character till the end of the year if at any time during the year the account is closed, much less when the suit is brought. Now it is in the suit that the plaintiff has to show that he is seeking to recover the balance due on a mutual, open and current account. It must follow therefore that if the account in question was closed prior to the suit, the suit cannot be said to be for the balance of an open

and current account. In order to bring the case under Art. 85, it is in my opinion necessary for the plaintiff to show that he is suing for the balance due on a mutual and open account. If at the time the suit was brought the account was closed, then I think the article would not apply. In other words the account must be open down to the suit. A similar view has been taken by the Lahore High Court in *Gurdas Ram-Kotu Ram* v. *Bhagwan Das* (2).

The next question is whether Art. 89 is applicable. In my opinion it is. The article applies, as the authorities show, to a suit by a principal against his agent for an account and for any money that may be found due on the taking of such account. The starting point of limitation is: (1) when the account is demanded and refused, or (2) when the agency terminates. But whatever starting point is taken in this case, in my opinion the suit is barred under the article. The correspondence to which I have referred clearly shows that a detailed statement of account was demanded by the plaintiffs but refused by the defendants who said that the statement they sent was correct and in effect declined to send any further statement. Mr. Setalvad refers to one or two decided cases in which it seems it was held that the refusal to render an account within the meaning of Col. 3, Art. 89, must be express. With all respect I differ from this view. In my opinion whether an account was demanded and refused or not must depend upon the circumstances of each case, and I see no reason why a refusal may not be inferred or implied from the facts of the case. But there can be no answer to the argument that the agency in this case terminated in July 1922, and that being the case, the suit was clearly barred under Art. 89, Limitation Act, 1908. In the result I agree that the appeal must be allowed and the suit dismissed with costs.

K.S. *Appeal allowed.*

** A. I. R. 1933 Bombay 457

Full Bench

BEAUMONT, C. J., MURPHY AND BROOMFIELD, JJ.

Mukund Bapu Jadhav—Appellant.

v.

Tanu Sakhu Pawar—Respondent.

Second Appeal No. 1093 of 1928, Decided on 20th January 1933.

**Civil P. C. (1908), O. 21, Rr. 35 and 97 —Failure to apply for removal of obstruction within 30 days does not debar application to obtain fresh warrant for possession under R. 35—Art. 167 does not apply to such application—Limitation Act (1908), Art. 167—11 Bom. 473, Overruled.

Where the judgment-creditor fails to apply for removal of an obstruction under O. 21, R. 97 within 30 days, he is not debarred from making an application under O. 21, R. 35, to obtain a fresh warrant for possession. Art. 167, Limitation Act, has nothing to do with such an application for warrant for possession, but it will be applicable, notwithstanding the fresh order for possession, to a subsequent application in respect of the same obstruction. And if the obstruction is by the same person and in the same character, the mere fact that the decree-holder is applying under a fresh warrant for possession would not make the obstruction a fresh obstruction: 11 *Bom* 473, **Overruled**; 26 *All* 365; 5 *Cal* 331, *Diss from*; 18 *All* 233; *A I R* 1919 *Pat* 475 (*FB*) and 13 *Mad* 504, *Rel on*. [P 458 C 1, 2; P 459 C 1, 2]

P. B. Gajendragadkar—for Appellant.

K. N. Koyajee, amicus curiae—for Respondent.

Beaumont, C. J.—This is a second appeal from a decision of the Assistant Judge of Satara raising a point of practice which has given rise to some difference of opinion amongst the High Courts. So far as respondents 2 and 6 are concerned, they have died and their heirs have not been brought on the record. Therefore, as against them, the appeal abates, and our decision does not affect them. Mr. Koyajee, who appeared for the heirs of respondent 6, admits that as his clients are not on the record he has no locus standi, but he has been good enough to assist us in the capacity of amicus curiae by arguing against the appellant. The point which arises for decision is whether the applicant, having obtained an order for possession under O. 21, R. 35, which has been obstructed, and having raised no objection to the obstruction within 30 days, is at liberty to apply for a fresh order for possession. The facts giving rise to the application are these. In March 1925 the applicant obtained a decree for possession of an immovable property. On 24th June 1925, there was an application for a darkhast, and a warrant for possession was given. On 29th October 1926, the warrant was returned on the ground that possession was obstructed, and on 21st January 1927, the darkhast was struck off the file. In March 1927 there was a fresh darkhast, which, on 5th July, was dismissed for default. Then,

on 6th July 1927, the present application for a darkhast was filed against the judgment-debtor. The lower Courts have held that the application does not lie, because the applicant did not take any steps under the previous darkhast. Now, O. 21, R. 35 (1), provides:

"Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."

The form of warrant which is issued under that rule is Form No. 11 in App. E. It is addressed to the bailiff of the Court, recites that property in the occupancy of so and so has been decreed to the plaintiff, and then directs the bailiff to put the plaintiff in possession and to remove any person bound by the decree who refuses to vacate. R. 97, O. 21, deals with the case of obstruction to possession. Sub-R. (1) of that rule provides:

"Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction."

Then Art. 167, Lim. Act, provides that any such application must be made within 30 days from the date of the resistance or obstruction. The question for our decision is, whether an application complaining of an obstruction not having been made within 30 days, the judgment-creditor is barred from making a fresh application for a writ of possession under R. 35 and is limited to the remedy of filing a suit. It is stated in Sir Dinshah Mulla's Civil Procedure Code, Edn. 9, p. 773, that the High Courts of Madras and Patna have held that a fresh application for delivery of possession on a fresh warrant may be applied for, and that the High Courts of Bombay and Allahabad have held that such an application cannot be made, and that the only remedy is a suit.

Looking at the words of R. 97, it is clear that it is permissive in character. The party obstructed is not bound to make an application to get the obstruction removed by the summary process laid down in the rule succeeding R. 97, though, if he does make such an application, he must make it within the 30 days laid down by Art. 167. But it seems to me clear that there may be more than one obstruction, and the fact that the decree-holder has chosen to make no application under the summary process in respect of the first obstruction would not debar him from making such an application in respect of a second obstruction. The first obstruction might be by a stranger and the decree-holder might consider that any application to remove such stranger summarily would probably fail, having regard to R. 99. But then that stranger might go out of possession, and there might be a subsequent obstruction by the judgment-debtor in respect of which the decree-holder might desire to take summary proceedings. In my opinion the decree-holder would have an additional 30 days from the date of that second obstruction within which to make his application, and the fact that he had failed to make an application in respect of a previous obstruction would be immaterial. If the decree-holder is to be entitled to make an application in respect of a second obstruction, it seems to me that he must be entitled, in order to put himself into a position to make such an application, to obtain a fresh warrant for possession under R. 35. There is nothing in R. 35 which requires an application under that rule to be within 30 days from the obstruction, since Art. 167 plainly has no reference to an application under R. 35. That being so, looking at the matter apart from authority, it seems to me that the lower Courts were wrong in saying that this application does not lie.

All that the applicant is asking at the moment is that a fresh warrant for possession may issue under R. 35, and to that, I think, he is entitled. That really disposes of the appeal, because we are not dealing today with the rights which may accrue under that fresh warrant. But, as the whole question has been argued, and as the rights accruing under the warrant will arise for decision at a later stage of these proceedings, it is, I think, desirable that we should indicate our opinion upon the point. If under the fresh warrant possession is obstructed and the decree-holder then applies under R. 97 complaining of the obstruction, and if the execution Judge then starts an inquiry under R. 98, in my opinion it will be open to the party obstructing to show

that his obstruction is by the same person and in the same character as the former obstruction in respect of which no proceedings were taken, and if he succeeds in proving that, Art. 167 will then be a bar to the decree-holder's application. The mere fact that the application is made in respect of a fresh warrant for possession does not, in my view, involve that the obstruction is a fresh obstruction.

Mr. Gajendragadkar on behalf of the appellant has referred us to all the cases on this subject. The decision of this Court in *Vinayakrav Amrit* v. *Devrao Govind* (1), a decision which both the lower Courts felt themselves bound to follow, was given in revision, and on that ground can be distinguished from the present case. But the learned Chief Justice did there, as it seems to me, express the view that if no objection had been made to an obstruction under the section of the Code, which then corresponded to R. 97, it would not be permissible for the decree-holder to apply for a fresh order for possession because that would render Art. 167, in effect, a dead letter. For the reasons which I have given, I do not think that view is correct. It seems to me, that Art. 167 has nothing to do with an application for a warrant for possession under R. 35, and that the article would still be applicable, notwithstanding the fresh order for possession, to a subsequent application in respect of the same obstruction. The Division Bench of the High Court of Allahabad in *Kesri Narain* v. *Abdul Hasan* (2) and a Bench of the Calcutta High Court in *Shoteenath Mookerjee* v. *Obhoy Nund Roy* (3) agreed with the decision of the Bombay High Court. But the case in *Kesri Narain* v. *Abdul Hasan* (2) is rather weakened by the fact that Knox, J., one of the Judges, expressed himself as still agreeing with the decision in *Narain Das* v. *Hazari Lal* (4) to which he had been a party, and which appears to me to conflict certainly in its reasoning with the later decision in *Kesri Narain* v. *Abdul Hasan* (2).

On the other hand a different view was taken by the Patna High Court in a case in which all the authorities are reviewed, *Raghunandan Prasad Misra* v. *Ram Charan Manda* (5) and this case followed a decision of the Madras High Court in *Muthia* v. *Appasami* (6). The balance of authority, as the learned Judges of the Patna High Court say, is rather in favour of the view which I am taking that a fresh application for an order for possession can be made in the circumstances of this case. With regard to the case in *Narain Das* v. *Hazari Lal* (4) the learned Judges there expressed the view that if a fresh application complaining of obstruction were made under R. 97 under a fresh warrant of possession, the mere fact that the application was made in respect of a fresh warrant for possession would involve that the application was in respect of a fresh obstruction. I am not myself disposed to agree with that view. I think that if in fact the obstruction is by the same person and in the same character, the mere fact that the decree-holder is applying under a fresh warrant of possession would not make the obstruction a fresh obstruction. For these reasons, I think that the decisions of the lower Courts were wrong, and that the appeal must be allowed with costs as against the party served.

Murphy, J.—I agree.

Broomfield, J.—I agree. I am of opinion that the lower Courts were wrong in holding that the darkhast was untenable and barrad in limine. The case they profess to follow, *Vinayakrav Amrit* v. *Devrao Govind* (1), does not, in my opinion, really decide that. On the facts of that case it was held that the decree-holder's application was virtually an attempt to renew the old proceedings, i. e., it was a case of the continuance of an obstruction which might have been, but had not been, dealt with by an application under the rule corresponding to R. 97, O. 21. The suggestion was made that the obstruction was a fresh one and as to that the Court said this (p. 475):

"It has however been stated before us that the original obstruction was by a third person, and that the present obstruction is by the judgment-debtor himself. No point was made of this before the Subordinate Judge. But assuming it to be the case, and that the present obstructor does not claim in any way through the third person who was in possession in 1877, which however is denied by the vakil for the opponent, it may be

1. (1887) 11 Bom 473.
2. (1904) 26 All 365=(1904) A W N 46.
3. (1879) 5 Cal 331.
4. (1896) 18 All 233=(1896) A W N 84.
5. AIR 1919 Pat 425=49 I C 150=4 Pat L J 91 (F B).
6. (1890) 13 Mad 504.

that, as three years have not elapsed since the applicant came of age, summary proceedings might be taken, under the Civil Procedure Code, to remove such an obstruction notwithstanding what occurred in 1877."

The reference to three years' limitation seems to show that the learned Judges thought that in the case of an obstruction by a different person, at any rate if that person is the judgment-debtor, a fresh darkhast followed by a fresh summary application is permissible. The question of the bar of limitation under Art. 167 can only arise, in my opinion, if and when the darkhastdar having got his writ of possession makes a fresh application under R. 97 and I agree with the learned Chief Justice in holding that that question must depend on whether the obstruction now offered is an obstruction by a different person, or an obstruction by the same person in different circumstances, that is a fresh obstruction, or whether it is merely a continuance of the same obstruction.

K.S. *Appeal allowed.*

A. I. R. 1933 Bombay 460

Full Bench

BEAUMONT, C. J., BLACKWELL AND RANGNEKAR, JJ.

A. H. C. Sykes—Applicant.

v.

Patrick Kelly—Opposite Party.

Misc. Case No. 73 of 1933, Decided on 28th August 1933.

Motor Vehicles Act (1914). S. 11 — Rule 7 made by Bombay Government under S. 11 is not ultra vires.

Rule 7 framed by Bombay Government under S. 11, Motor Vehicles Act, which provides that certain annual fees have to be paid for renewal of certificate of registration is not ultra vires as the words "incidental to registration" in S. 11 are wide enough to cover renewal of certificates. [P 461 C 1, 2]

F. J. Coltman—for Applicant.

Jamshed Kanga—for Opposite Party.

Beaumont, C. J.—This is a petition presented to the Court under S. 45, Specific Relief Act. The petitioner's case is that he owns a motor car, and he has applied to the Commissioner of Police, Bombay, as the registering authority, to grant him a renewal of his certificate of registration, which expires on 31st August 1933, and that the Commissioner has refused to grant such certificate except on payment of a fee of Rs. 32, which the petitioner says the Commissioner has no right to charge. Therefore the petitioner asks us to make an order under S. 45 directing the Commissioner of Police to renew the registration certificate without requiring the payment of a fee.

The question on the merits turns on the construction of the Indian Motor Vehicles Act (8 of 1914), and the rules made thereunder. By S. 10 (1) of the Act it is provided that the owner of every motor vehicle shall cause it to be registered in the prescribed manner. Then sub-S. (2) provides that such registration shall be valid in such area as may be specified in the certificate of registration. So that, that section contemplates the issue of a certificate of registration. Then S. 11 provides that the Local Government shall make rules for carrying into effect the provisions of the Act; and sub-S. (2) (a), which is the material one, provides that the rules may provide for any of the following subjects, namely, providing for the registration of motor vehicles, and the conditions subject to which such vehicles may be registered, the fees payable in respect of and incidental to registration, the issue of certificates of registration, the notification of any changes of ownership, and (subject to the provisions of S. 10) the area in which and the duration for which certificates of registration shall be valid.

Rules were duly made by the Government of Bombay under S. 11 of the Act. Rule 2 constitutes the Commissioner of Police for the City of Bombay as the registering authority for the city. Then R. 6 (1) provides that no motor vehicle shall be used unless it has been registered by the registering authority, and unless the registration certificate granted in respect thereof is in force. It is somewhat curious that although that section provides that the motor car cannot be used unless the registration certificate in respect of it is in force, there is no specific provision in the Act or in the rules which requires the registering authority to grant a certificate. But, I think, such an obligation is clearly to be inferred from the scheme of the Act and the rules. Then R. 7 provides that certain fees are to be paid for registration, and then it provides that:

"the annual fees for renewing registration certificates, when such certificates are presented for renewal on or before the date of expiry or within ten days after that date, shall be Rs. 32 for motor vehicles of two tons and under."

It is under this rule that the Commissioner of Police, as the registering

authority, has required the petitioner to pay Rs. 32 for the renewal of the certificate. The petitioner alleges that that provision of R. 7 is ultra vires, because S. 11 (2) (a) of the Act, under which the rules are made, does not enable the Government to provide for charging fees in respect of the renewal of certificates of registration.

I return now to the actual words of S. 11 (2) (a). The rules may provide for the registration of motor vehicles, and the conditions subject to which such vehicles may be registered, and the fees payable in respect of and incidental to registration. There is no other direct reference to fees, but the rules may include the issue of certificates of registration, and the area in which and the duration for which certificates of registration shall be valid. Mr. Coltman says that we must construe that section narrowly, and the Advocate-General says that we must construe it broadly. I think myself that we must construe it fairly. It is quite true, as Mr. Coltman contends, that the only direct reference to fees being made payable is in respect of and incidental to registration, and the section does not in terms provide for the payment of fees on the renewal of certificates of registration. But construing the section and the rules together, and giving them their fair meaning, I think that the scheme is to charge fees in respect of the whole system of registration. The scheme is to register the motor car once and for all, and then annually to issue a certificate of registration, and the car cannot be used unless the certificate is in force.

The Act might have provided in terms that the registration should be an annual registration, in which case there could be no question that the charging of the fee for the renewal of registration would come within the terms of S. 11 (2) (a) of the Act. But it seems to me that the scheme of the Act being to impose registration once and for all, and then to have an annual renewal of the certificate of registration, we must take the whole of that scheme together. And when the Act enables rules to be made making fees payable in respect of and incidental to registration, the words "incidental to registration" are wide enough to cover renewal of the certificates, which renewal is itself one of the incidents of registration. Clearly, if there were no provisions for registering motor cars, there would be no necessity to have certificates of registration, and to renew those certificates annually. That being so, in my opinion, the Commissioner of Police was right in reading R. 7 as intra vires, and refusing to issue the certificate of registration except on payment of a fee of Rs. 32. In that view of the case, it is not necessary for us to consider the point urged by the Advocate-General that this case does not properly fall within S. 45, Specific Relief Act. For the purpose of our judgment, we will assume that the case falls within that section; but we must not be taken as deciding that point. The rule is therefore discharged with costs.

Blackwell, *J.* — I am of the same opinion.

Rangnekar, *J.*—I agree and have nothing to add.

K S. *Rule discharged.*

A. I. R. 1933 Bombay 461

Full Bench

BEAUMONT, C. J., SHINGNE AND WADIA, JJ.

Emperor

v.

Lakshman Shivram—Accused.

Second Criminal Sessions Case No. 4 of 1933, Decided on 4th August 1933.

(a) Bombay Borstal Schools Act (18 of 1929), S. 6—Proper form of order is to convict accused and then in lieu of sentence of imprisonment sentence him to be detained—Borstal Institute is not prison and detention there is not imprisonment.

Accused who was convicted was directed by the Judge that he be kept in rigorous imprisonment for a term of two years and that the execution of the sentence be carried out in the Borstal Institution:

Held: that the order of sentence was wrong and that the proper form of order was to convict the accused, and then, in lieu of sentence of imprisonment, sentence him to be detained for a period of not less than two years and not more than five years, because the Borstal Institute is not a prison, and detention there is not imprisonment: *AIR* 1932 *Bom* 489, *Rel on.* [P 462 C 1]

(b) Words and Phrases — No difference between words "found guilty" and "convict"—Criminal Trial.

There is no distinction between the expressions "found guilty" and "convict." [P 462 C 1]

R. J. Colah—for the Crown.

N. H. Jhabvala—for Accused.

Beaumont, C. J.—In this case the accused was charged under Ss. 366 and 376, I. P. C: he was convicted under S. 366 and acquitted under S. 376. The learned

Judge directed that the accused be kept in rigorous imprisonment for a term of two years and that the execution of the sentence be carried out in the Borstal Institution at Dharwar. The learned Advocate-General has given a certificate under Cl. 26 of the Letters Patent alleging that there is an error of law in the sentence. S. 6, Borstal Schools Act, provides that when an offender is found guilty of an offence for which he is liable to be sentenced to transportation or imprisonment and certain conditions are satisfied, it shall be lawful for the Court to pass in lieu of a sentence of transportation or imprisonment an order that the offender be detained in the Borstal School for a certain term. This Court pointed out in the case of *Emperor* v. *Mathuradas Purshottam* (1) that the proper form of order was to convict the accused, and then, in lieu of sentence of imprisonment, sentence him to be detained for a period of not less than two years and not more than five years, and that seems to us to be the correct order to make, because the Borstal Institute is not a prison, and detention there is not imprisonment.

Mr. Jhabwala, who appears for the accused and also for the parents, who are entitled to be heard under the proviso to S. 6, objects to the use of the word "convict" and points out that in S. 6 the words used are "when an offender is found guilty." But in my opinion, there is no distinction between the expressions "found guilty" and "convict." The verb "convict" is generally used throughout the Criminal Procedure Code, and I think it is proper to use that word in cases such as this. If there were a distinction between "conviction" and "finding guilty" various difficulties would arise under the Code, for instance, on a subsequent conviction, a case in which a person had been merely found guilty could not be proved as a previous conviction, and under S. 403 a person merely found guilty of an offence would not be free from subsequent trial for that same offence. We think, therefore, the order in *Emperor* v. *Mathuradas Purshottam* (1) was the right form of order to make. In this case we accede to the prayer of the Advocate-General and alter the sentence by convicting the accused under S. 366 and directing that he be detained in the Borstal Institute for two years. The sentence will commence from the date when the learned Judge passed the sentence.

K.S. *Order accordingly.*

1. A I R 1932 Bom 481=1932 Cr C 617=137 I C 182=33 Cr L J 305.

A. I. R. 1933 Bombay 462

BAKER, AG. C. J. AND DIVATIA, J.

Girdhardas Liladhar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Applns. Nos. 141 and 145 of 1933, Decided on 3rd July 1933, from order of Presidency Magistrate, Third Court, Bombay.

Stamp Act (1899), Ss. 62 (1) and 65—Giving unstamped receipt and refusing to give stamped receipt even when demanded constitute two offences though in respect of the same transaction.

The offence under S. 65 consists in not giving a properly stamped receipt when demanded; the offence under S. 62 (1) (b) consists in passing a receipt unstamped, whether one is demanded by the payer or not. Hence where a person gives an unstamped receipt and refuses to give a stamped one even after demanding for same, he commits two offences both under Ss. 62 and 65 in respect of the same transaction : 8 *Mad* 11 (*FB*) and 11 *Mad* 329, *Ref.*; 27 *Cal* 324, *Rel. on.* [P 463 C 2]

G. C. O'Gorman Pereira, Amin and *Fazalbhoy*—for Petitioner.

B. G. Rao—for the Crown.

Baker, Ag. C. J.—These two applications are both closely connected, and may be disposed of together. The applicant, who is a partner in a firm, has been convicted by the Presidency Magistrate, third Court, Bombay, of two offences under the Stamp Act: one under S. 62 (1) (b), "executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped," and the other under S. 65, Cl. (a), "being required under S. 30 to give a receipt, refuses or neglects to give the same." He has been sentenced to a fine of Rs. 50 under each of the two sections in the two cases. The facts are simple. The accused's firm were import and export merchants, and they ordered out goods from Europe and other countries for their constituents. In the course of their business a consignment of watch glasses were ordered out for the International Watch Company in July 1929 and in respect of that consignment a receipt, unstamped, was

passed by the firm and signed by the present applicant on 31st January 1931 in favour of the International Watch Trading Company. As regards the other case there was another consignment of goods, also apparently for the International Watch Company, in respect of which a receipt dated 4th July 1929 was passed without being stamped for Rupees 78-6-0 in favour of one R. F. Davar. R. F. Davar was a clerk of the accused, and he is the person who received the money in the first case from the International Watch Company and in the second case it is not quite clear in what capacity he acted—he was still a clerk of the firm, but he received the money and paid the money in respect of this consignment into the firm. There can be no doubt that this case would not have come before the Court were it not for the fact that subsequently the accused fell out with Davar, who was dismissed in February 1931 and a decree was obtained against him in the Small Cause Court on 25th April 1932. On the following day Davar went to the stamp authorities with these two unstamped receipts and the present proceedings were instituted on his information. There can be no doubt therefore that the present cases are instituted in revenge for his having been dismissed by the applicant's firm. That however is a matter with which we are not concerned, inasmuch as the present matter has to be decided on a pure point of law.

It has been argued by the learned counsel for the applicant that there cannot be two convictions under two separate sections in respect of these two receipts. He argues that if there is a failure under S. 65 to give a stamped receipt on demand, S. 62 can have no application, inasmuch as that applies to executing a receipt, whereas S. 65 applies to failure to execute a receipt. But as a matter of fact both these sections will apply, and have been held to apply, to matters of this character. A receipt is chargeable with a duty of one anna under Art. 53 of the first schedule to the Stamp Act. Under S. 62 (1), Cl. (b), any person executing or signing otherwise than as a witness "any other instrument," i. e., any instrument other than a bill of exchange or promissory note, chargeable with duty without the same being duly, stamped is punishable with fine. This section is drafted in extremely general terms, and is quite wide enough to cover the case of a receipt. As a matter of fact a letter acknowledging the receipt of money in satisfaction of a debt has been held to be chargeable with duty, and writers of such letters have been convicted under this section for omitting to stamp them: vide *Reference under Stamp Act*, S. 46 (1) and *Queen-Empress* v. *Muttirulandi* (2). S. 65 refers to any person who, being required under S. 30 to give a receipt, refuses or neglects to give the same, and S. 30 lays down that any person receiving any money exceeding twenty rupees in amount shall on demand by the person paying or delivering such money give a duly stamped receipt for the same. It would seem therefore that a person who gives an unstamped receipt to evade the payment of duty commits an offence under S. 62 (1) (b), Stamp Act, and also an offence under S. 65, Cl. (a). The offence under S. 65 consists in not giving a properly stamped receipt when demanded; the offence under S. 62 (1) (b) consists in passing a receipt unstamped, whether one is demanded by the payer or not and this view is supported by a ruling of the Calcutta High Court in *Queen-Empress* v. *Khetter Mohun Chowdhry* (3) in which the facts are very similar to the present case, and it was held that the members of the firm who were charged under S. 61 Stamp Act, of 1879, with having granted an unstamped receipt and under S. 64 of that Act with having refused to grant a stamped receipt were liable to punishment under both sections, provided that in the latter case the requisition under S. 58 of the Act had been established by evidence (Ss. 61 and 64 correspond to the present Ss. 62 and 65 respectively, and S. 58 corresponds to S. 30). Therefore the argument of the learned counsel that there cannot be two offences under two sections in respect of the same transaction is not in my opinion correct.

Now, turning to the actual facts in the present case, so far as regards the first case the payment was made by Davar, and the receipt is passed in his name. It does not make any difference as to the capacity in which Davar made

1. (1884) 8 Mad 11=1 Weir 902 (FB).
2. (1887) 11 Mad 129.
3. (1900) 27 Cal 324=4 C W N 440.

this payment, because the receipt being passed to him he must be taken to be the payer under S. 30, and Davar has given evidence that he asked for a receipt and it was refused. This is an application in revision, and we cannot go into the facts. We must accept the finding of the Magistrate that the accused refused to give him a stamped receipt, and therefore under S. 30 read with S. 65, Cl. (a), an offence is constituted, and as already pointed out, the receipt in the name of Davar, being unstamped, the offence under S. 62 (1) (b) is also constituted. Therefore the conviction in the first case is correct. As regards the second case in which the receipt is in the name of the International Watch Company, Davar has admitted in his evidence that the International Watch Company did not ask for a receipt. It is also clear that the receipt came from the possession of Davar and was never handed over to the Watch Company. Therefore there has been no demand by the International Watch Company, who must be regarded as the payers under S. 30, and therefore there having been no demand under S. 30 there can be no refusal under S. 65, and the conviction under S. 65, Cl. (a), is wrong, and must be quashed. But, as regards the conviction under S. 62 (1) (b), the receipt in the name of the International Watch Company being unstamped, that conviction will stand. The order of the Magistrate will therefore be modified by quashing the conviction under S. 65 (a) and the sentence of fine of Rs. 50 under that section in Criminal Revision Application No. 141 of 1933, and that portion of the fine should be refunded. The rest of the order will be confirmed and the rule discharged.

Divatia, J.—I agree. The principal argument of the learned counsel for the applicant is this: that the case of a receipt does not fall under S. 62, Stamp Act, because it has been separately and specifically provided for in S. 65. The argument proceeds upon the assumption that a receipt requires to be stamped only when it is demanded and not otherwise. But looking to the scheme of the Act, I do not find that the offence would occur only if the stamp is demanded and not otherwise. These are two different acts. The act of executing or signing a receipt without the same being duly stamped is one act, and the act or omission of refusing to give or not giving a stamped receipt when it is demanded by the person to whom the receipt is addressed is entirely a different act. The legislature has used general words in S. 62 (1) (b) which would include the case of a receipt as well as any instrument which is chargeable with duty, and it is treated as a graver offence than the offence under S. 65. The offence under S. 62 is punishable with a fine which may extend to Rs. 500, and the offence under S. 65 is punishable with a fine which may extend to Rs. 100. The reasons for treating these two acts separately are to my mind these: the Stamp Act requires that the execution of an instrument itself in certain cases requires a duty. The demand for the instrument or the use of that instrument for any particular purpose is not material so far as the duty to affix a stamp goes. It is the execution or the making of the instrument itself which is the principal act, and that being so S. 62 refers to the act of making or executing an instrument, while S. 65 refers to the act or omission of refusing to give the receipt when it is demanded. Therefore I think, apart from the authorities of the Madras and Calcutta High Courts, the sections themselves are clear that these two are different acts, and that in both cases the conviction under S. 62 is correct.

With regard to the conviction under S. 65 in the first revision petition, it is clear that what is intended under S. 30 of the Act is demand by the person who pays it, in other words, from whose pocket the money comes and who has the right to demand the receipt, and it is not the demand of an intermediary who actually pays the money to the person. That being so, it is clear that it was the International Watch Company from whose pocket the money was paid, who were entitled to the receipt. Clearly there has been no demand by that company, and therefore there is no offence under S. 65 of the Act. I therefore agree that in the first revision petition the conviction under S. 65 should be set aside. In the second revision petition, I agree that the conviction under both the offences should be affirmed.

K.S. *Order accordingly.*

* A. I. R. 1933 Bombay 465

B. J. WADIA, J.

Pauline D'Souza—Plaintiffs.

v.

Cassamalli Jairajbhoy—Defendant.

Civil Suit No. 2743 of 1926, Decided on 3rd February 1933.

(a) Tort —Negligence—Generally plaintiff must prove negligence of defendant— But if defendant is under duty to exercise care, and if no injury would have been caused if he had taken such care, the onus is shifted on him to disprove his liability.

Generally speaking, it is for the plaintiff in an action for negligence to establish: (a) that the defendant was under a duty to take care towards the complaining party to avoid the damage complained of, (b) that there was a breach of that duty on the part of the defendant, and (c) that the breach was the direct and the proximate cause of the damage complained of. The onus of proving negligence is on the plaintiff, and the mere proof of the happening of an accident is not, as a general rule, sufficient evidence to support the action. An exception to the general rule however occurs whenever the facts established are such, that the proper and natural inference, arising from them, is that the injury complained of was caused by the defendant's negligence. Whenever there is a duty cast upon the defendant to exercise care, and the circumstances under which the injury happened are such that, with the exercise of the requisite care, no risk would have ensued in the ordinary course of events, the burden is shifted to the defendant to disprove his liability. Every accident does not warrant an inference of negligence, but there may be accidents of such a nature that negligence is presumed from the mere fact of their having happened. The presumption depends upon the nature of the accident. It is usual to refer to such cases under the maxim *res ipsa loquitur* : *English cases referred.* [P 466 C 1]

(b) Tort—Negligence— Plaintiff must lead evidence to prove defendant's negligence—He should not be allowed to lead evidence in rebuttal after defendant has led his evidence.

It is for the plaintiff to lead whatever evidence he wants to with regard to the facts and circumstances relating to the defendant's negligence. There must be some reasonable evidence of negligence. The plaintiff may rely on the undisputed facts and ask the Court to draw the presumption of negligence in his favour, or he may, in addition, lead such evidence as he likes relating to the defendant's negligence, but he should not, as a rule, be allowed to lead evidence in rebuttal after the defendant has led his evidence and closed his case. That however will not in any way lessen the burden that may be held to lie upon the defendant. If there is some reasonable evidence of negligence, and there are also facts supporting the presumption of negligence, it is for the defendant to prove facts inconsistent with the negligence or facts which rebut the presumption. [P 466 C 2 ; P 467 C 1]

*** (c) Tort—Negligence— Purchaser of car under hire-purchase agreement — Car damaged due to negligence of defendant while in possession of such purchaser, when he has not paid all instalments —He can still maintain suit against defendant as owner of car—Contract Act (1872), S. 180.**

A purchaser of a car under a hire-purchase agreement is in the position of a bailee, when he has not paid all the instalments to the vendor. As a bailee, he is not the agent of the bailor and when the car is damaged while in his possession by the alleged negligence of the defendant, he can, though he is not, strictly speaking, the owner of the car, still maintain a suit for damages as owner of the car without prejudice to the rights of the bailor to adjust the amount of damages when recovered : 43 *Cal* 733 and *Croft* v. *Alison*, (1821) 4 *B & Ald* 590, *Ref.* [P 467 C 2]

(d) Tort—Negligence — Damage caused by fall of building—Presumption of negligence is against owner or occupier — Maxim, Res ipsa loquitur.

An owner or occupier of property must keep it in a reasonably safe condition and repair as regards the persons being or passing near the property as of right, and he is liable for negligence to person or property or both if the injury is caused by want of such condition and repair. He is liable if the injurious agency is entirely under his control, and especially if that agency is inanimate. There is a presumption of negligence against the defendant according to the maxim *res ipsa loquitur* and it is therefore for the defendant to rebut the presumption and give a reasonable explanation for the collapse which caused the damage. [P 468 C 1]

C. K. Daphtary and *M. M. Thakor* —for Plaintiffs.

Lalji Gokaldas and *T. M. Guido*— for Defendant.

Judgment.—The plaintiffs have filed this suit to recover from the defendant the sum of Rs. 4,499-8-0 for the loss and damage caused by the destruction of a taxi Ford Car No. Y 899 on 21st July 1926. Plaintiff 1 says in the plaint that she was the owner of the car, and that it was insured with plaintiff 2 company. The defendant is the owner of a building called 'Khalakdina Terrace' situate at Gowalia Tank Road, Bombay, and on the day in question a portion of the terrace of the said building consisting of an ornamental structure made of Porebunder stone and resting over the parapet wall on the southern side of the building gave way and fell on the said car which was stationary at the stand on Tejpal Road to the south of the building. The car was completely destroyed, and the driver received serious injuries to which he ultimately succumbed. The plaintiffs contend that the portion of the terrace fell down owing to the defendant's negligence, and that he is liable in damages. The defendant denies negligence, and says that the fall was due to an inevitable accident, and that he is not liable to pay any damages to the plaintiffs or either of them.

The principal issue in the case is one of negligence. Generally speaking, it is for the plaintiff in an action for negligence to establish (a) that the defendant was under a duty to take care towards the complaining party to avoid the damage complained of, (b) that there was a breach of that duty on the part of the defendant, and (c) that the breach was the direct and the proximate cause of the damage complained of. The onus of proving negligence is on the plaintiff, and the mere proof of the happening of an accident is not as a general rule sufficient evidence to support the action. An exception to the general rule however occurs whenever the facts established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence. Whenever there is a duty cast upon the defendant to exercise care, and the circumstances under which the injury happened are such that with the exercise of the requisite care no risk would have ensued in the ordinary course of events, the burden is shifted to the defendant to disprove his liability.

Every accident does not warrant an inference of negligence but there may be accidents of such a nature that negligence is presumed from the mere fact of their having happened. The presumption depends upon the nature of the accident. It is usual to refer to such cases under the maxim *res ipsa loquitur*. A leading illustration of such cases is *Scott* v. *London and St. Katherine Docks Co.* (1), in which the plaintiff, a customs officer, went to the defendants' docks on business, and in passing from one door-way to another was injured by six bags of sugar which were hung by a chain falling upon him. The rule was thus stated by Erle, C. J., at p. 601:

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

It was held in *Byrne* v. *Boadle* (2) that there was prima facie evidence of negligence where a person going along a highway was injured by the fall of a barrel of flour from out of the window of the defendant's warehouse, and that such evidence was sufficient to cast upon the defendant the onus of proving that the accident was not caused by his negligence. In *Kearney* v. *London, Brighton &c., Railway Co.* (3) the plaintiff was injured by the fall of a brick from the defendant's bridge. Cockburn, C. J., laid down the rule at p 415 as follows:

> "Where it is the duty of persons to do their best to keep premises, or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen. Therefore there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts. ; . . . ."

This case was confirmed in appeal (4). All theses case have been discussed by Pollock in his Law of Torts, Edn. 13, and at p. 539 he states the rule as follows:

> "Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence. In other words, the burden of proof is on the occupier of the building. If he cannot show that the accident was due to some cause consistent with the due repair and careful management of the structure, he is liable."

It follows therefore that if the cause of the injury is explicable, the explanation must be given by the defendant. An application was made to me in this case that liberty should be reserved to the plaintiffs to call their evidence in rebuttal after the defendant had led his evidence to disprove his liability, but I was not referred to any case in which evidence in rebuttal was allowed to be led. It is for the plaintiff to lead whatever evidence he wants to with regard to the facts and circumstances relating to the defendant's negligence. There must be some reasonable evidence of negligence. The plaintiff may rely on the undisputed facts and ask the Court to draw the presumption of negligence in his favour, or he may in addition lead

1. (1865) 3 H & C 596=34 L J Ex 220=11 Jur N S 204=13 W R 410=13 L T 148.
2. (1863) 2 H & C 722=12 W R 279=9 L T 450 =33 L J Ex 13.
3. (1870) 5 Q B 411.
4. (1871) 6 Q B 759=40 L J Q B 285=20 W R 24=24 L T 913.

such evidence as he likes relating to the defendant's negligence, but he should not as a rule be allowed to lead evidence in rebuttal after the defendant has led his evidence and closed his case. That however will not in any way lessen the burden that may be held to lie upon the defendant. If there is some reasonable evidence of negligence, and there are also facts supporting the presumption of negligence, it is for the defendant to prove facts inconsistent with the negligence or facts which rebut the presumption. The next question is whether plaintiff 1 was at all material times the owner of the car in suit. Plaintiff 1 entered into a hire-purchase agreement in respect of the car with the Otto Supply Company, Ltd., on 28th October 1925, and under the agreement she agreed to pay to the company Rs. 686-8-0 before delivery of possession of the car, and the balance by twelve monthly instalments of Rs. 125 each. She however paid in all at first Rs. 1,000-8-0 which included the sum of Rs. 686-8-0, the excess amount being paid for insurance premium and other charges, and passed twelve hundis of Rs. 125 each in favour of the company the first being payable one month after date, the second payable two months after date, and so on. She paid in all eight instalments before the date of the accident, and got back the eight hundis which have been put in. After the accident the Otto Supply Company recovered on 9th October 1926, the sum of Rs. 1,537-8-0 from the second plaintiff company with which the car had been insured, and deducting Rs. 500 in respect of the remaining four hundis, the Otto Supply Company paid the balance to plaintiff 1 on or before 18th October 1926.

The suit was filed on 25th November 1926. Under the hire-purchase agreement plaintiff 1 was entitled to terminate the agreement before the car became her property, and it could become her property only after payment of all the instalments per month or on payment of all of them or those that remained payable in a lump. Until then plaintiff 1 acknowledged the Otto Supply Company Ltd. as the owners of the car. She had admittedly not paid all the instalments before the date of the accident, viz. 21st July 1926, so that at that date the car was not her property, and in fact the Otto Supply Co. carried on correspondence with her as owners. On the day of the accident the car was smashed and was a total wreck, and was disposed of on 6th October 1926, by the Otto Supply Co. on behalf of second plaintiff company for a sum of Rs. 50 which sum counsel for the defendant admitted was the best price that could be obtained for the salvage. On 18th October 1926, plaintiff 1's solicitors on her behalf purported to assign all rights in and the ownership of the car to the second plaintiff company. Plaintiff 1, was therefore not strictly speaking the owner at the date of the accident, and though she paid off the remaining instalments by 18th October 1926, the car had been sold off and did not belong to her at the date of the suit. Plaintiff 1 was therefore not the owner, strictly speaking, at the date of the suit either. The cause of action, however accrued to her on the date of the accident, and at that date she was in the position of a bailee. As such she is entitled to maintain an action against a third party who does not claim under the bailor according to S. 180, Contract Act. As a bailee she is not the agent of the bailor, and she can sue and claim the full damages for loss due to the alleged negligence of the defendant without prejudice to the rights of the bailor to adjust with her the amount of damages when recovered: see Halsbury, Vol. 1, Edn. 2, pp. 766, 777; *Ramnath Gagoi* v. *Pitambar Deb* (5). Counsel for the defendant argued that it was not pleaded in the plaint that plaintiff 1 was a bailee, but her legal position is a point of law. Even if she was merely the hirer, she had engaged a chauffeur and purchased accessories to ply the car for hire in Bombay, and under the circumstances, as was pointed out in *Croft* v. *Alison* (6), she could be properly described in the plaint as the owner of the car. As bailee she was in possession. Possession is a title against the wrong-doer, and the presumption of law is that the person who has the possession has also the property. I, therefore, hold that plaintiff 1 could maintain this suit as "the owner" of the car.

I will now deal with the important question in the suit, viz. whether the fall of the ornamental structure on the terrace of the defendant's building was

5. (1916) 43 Cal 733=31 I C 430.
6. (1821) 4 B & Ald 590.

due to the defendant's negligence. It is a rule of the English Common law that an owner or occupier of property must keep it in a reasonably safe condition and repair as regards the persons being or passing near the property as of right, and he is liable for negligence to person or property or both if the injury is caused by want of such condition and repair. He is liable if the injurious agency is entirely under his control, and especially if that agency is inanimate. I have already held that it was for the plaintiffs to lead all their evidence first, if they relied on any, relating to the defendant's negligence. Plaintiffs led all their evidence accordingly, and apart from the facts they sought to establish, there is, in my opinion, a presumption of negligence against the defendant according to the maxim 'res ipsa loquitur'. It has been said that "buildings properly constructed do not fall without adequate cause," and it is therefore for the defendant to rebut the presumption and give a reasonable explanation for the collapse which caused the damage. In the course of the correspondence that passed between plaintiff 1 and the defendant after the suit plaintiff 1 was asked to give particulars of the defendant's negligence, and by her attorney's letter dated 9th February 1927 she gave some of the particulars of negligence on which she wished to rely, viz. (a) neglect to supervise to keep the ornamental structure in proper condition, (b) neglect to keep it safe for those lawfully using the road, (c) absence of dowels (iron pieces) by which two stones can be held together, and (d) weakness of the joints between the stones and also want of proper cementing of the stones.

Plaintiff 1 promised to send further particulars, but failed to do so. An issue was raised, whether the fall of the portion of the terrace was due to the defendant's negligence particulars whereof are given in the said letter, and counsel for the defendant argued that the plaintiffs must be confined to the said particulars. The plaintiffs however raised an additional issue, whether the fall of the portion of the terrace was due to the defendant's negligence, meaning the defendant's negligence generally. It was contended that the evidence led by the plaintiffs went beyond those particulars, but, in my opinion, it only contains details which can be ultimately referred to the particulars given in the letter. According to the doctrine of '*res ipsa loquitur*' it is for the defendant to show some cause for the collapse consistent with reasonable care on his part, and even his evidence has travelled beyond the allegation contained in the written statement. Moreover, all the evidence is now before the Court, and it has to be considered in order to ascertain the liability of the defendant. (His Lordship then discussed the evidence in the case and proceeded). I have now dealt with all the evidence which was led in order to determine the real cause of the collapse.

All the causes mentioned were suggested as probable causes, but the evidence shows that the cause deposed to by Mr. Batley is the only probable cause and nearest the truth, viz. the breaking of the stones in one of the two consoles and the pilasters due to an internal flaw which led to the gradual disintegration of the inside material of the stone by being soaked in rain water. This inward disintegration could not be easily detected, especially if the stones were oil painted, as in fact they were. In the case of *Kearney* v. *London, Brighton, &c, Ry. Co.* (3), referred to before, in which the brick fell from a railway bridge built only about three years before the date of the accident, the plea of res ipsa loquitur put forward by the plaintiff was not met by any evidence on the side of the defendants at all, and one of the Judges who disagreed with the majority went so far as to say that it was for the plaintiff to have proved facts to show that any one might have seen on inspection that the brick was loosened and about to fall. In *Tarry* v. *Ashton* (7) the overhanging lamp weighed forty or fifty pounds and projected several feet across the payment, and three or four months before it fell defendant was made aware that it was getting out of repair. In *Pritchard* v. *Peto* (8) a piece of projecting cornice fell on the plaintiff who went to the defendant's house to collect money due to him, and it was held that the defendant was not liable, as it was not shown that she was aware or ought to have been aware of the defect. That was

7. (1876) 1 Q B D 314=45 L J Q B 260=24 W R 581=34 L T 97.
8. (1917) 2 K B 173=86 L J K B 1292=15 L G R 860=117 L T 145.

however the case of a duty of the owner or occupier of a house towards an invitee, and that duty has been defined by Willes, J., in *Indermaur* v. *Dames* (9) as follows, viz. to use reasonable care, "to prevent damage from unusual danger." I have already stated that it was for the defendant to show that the happening of the accident was consistent with reasonable care on his part. In *Fawkes* v. *Poulson* (10) the plaintiff was injured by the fall of one bale out of several which were let down by a crane, and Lindley, L. J., held that he did not mean to say that it might not be possible to prevent the bales from slipping

"if the lowering was conducted with all the care which would be applied to a scientific experiment but the question was whether, looking at the matter from a business point of view, the slipping of the bale could have been prevented with any amount of reasonable care, whatever might have been the cause of the slipping. . ."

It was held in that case that the defendants were not liable. In my opinion, the defendant in this suit has answered the prima facie case made out against him, and discharged the burden that lay upon him to disprove his liability. It was really unfortunate that the accident led not merely to loss of property but to the loss of human life; but it was an inevitable accident which could not have been prevented by the exercise of reasonable care, caution and skill. In view of my finding on the issue of negligence, it is not necessary to go into the question of damages. The plaintiffs have annexed to the plaint a statement of the particulars of the damage caused by the collapse, but its correctness is disputed by the defendant. The suit must therefore be dismissed. I have now heard counsel on the question of costs. The main issue in the suit was one of negligence, and substantially the suit has been decided in favour of the defendant. With regard to issue 1 counsel for the defendant argued in the beginning that the suit was not maintainable and plaintiff 1 was not the owner of the car. It was at a later stage argued by counsel for the plaintiffs that even if plaintff 1 was not the owner, she was in the position of a bailee and could be described as "owner" and thus maintain the action. That position however is not clearly indicated in the plaint, nor was it set up from the commencement of the hearing. Taking everything into consideration, the suit, in my opinion, must be dismissed with costs.

K.S. *Suit dismissed.*

9. (1866) 1 C P 274.
10. (1892) 8 T L R 725.

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* A. I. R. 1933 Bombay 469

B. J. WADIA, J.

Narbheram Jivram Purohit and *another*—Plaintiffs.

v.

Jevallabh Harjivan—Defendant.

Original Civil Jurisdiction Suit No. 131 of 1932, Decided on 23rd September 1932.

(a) Bombay High Court Original Side Rules (1930), Rr. 58 and 60—Every Judge is competent to discharge all functions on original side subject to assignment of business under R. 60.

Every Judge of the High Court by virtue of his appointment is competent to discharge all the functions connected with the High Court on its original side, that is, he has full powers to exercise all or any part of the jurisdiction vested in the High Court, on its original side, subject only to the assignment of business under R. 60 for the sake of convenience in the due administration of justice: *Bom. O. C. J. Suit No.* 2490 *of* 1923, *Ref*; 39 *Bom.* 604, *Expl.* [P 472 C 2]

(b) Succession Act (1925), S. 273—Probate is conclusive of not only factum, but also of validity of will.

When probate is granted, it operates upon the whole estate and establishes the will from the death of the testator. Probate is conclusive evidence not only of the factum, but also of the validity of the will. [P 473 C 2]

(c) Succession Act (1925), S. 263—After probate is granted will cannot be declared to be null and void unless probate is revoked.

Where the probate has been granted, it is incumbent on a person who wants to have the will declared null and void, to have the probate revoked before proceeding further. [P 473 C 2]

*** (d) Succession Act (1925), S. 263—Probate granted by High Court can be annulled by petition on intestate and testamentary jurisdiction and not by suit on ordinary original civil jurisdiction—But suit filed on original side is not liable to be dismissed or transferred to proper Court, but must be stayed.**

The procedure for getting a probate granted by the High Court revoked is by filing a petition on the testamentary and intestate jurisdiction and not by filing a suit on the side of ordinary original civil jurisdiction. But where a suit is filed on the original side in which the plaintiff prays for revocation of probate among other reliefs, the suit cannot be transferred to the Court dealing with testamentary and intestate matter, nor can the one relief appropriate to that division be so transferred, nor can the suit be dismissed on that ground, but it must be stayed: *Case law referred.* [P 474 C 2; P 475 C 1]

M. P. Amin—for Plaintiffs.

Chimanlal Setalvad and *A. C. Amin*—for Defendant.

Judgment.—One Hirabai, widow of Madhavji Makanji, died at Bombay on or about 1st January 1932, leaving a will dated 20th December 1931, of which the defendant is the executor. Defendant applied to this Court for probate on 12th July 1932, and probate was granted to him on 5th August 1932. The plaintiffs say that they are the sons of a cousin of the deceased and claim to be her heirs. On 20th August they filed this suit praying for a declaration that they are the heirs of the deceased Hirabai, that the will is not her valid and lawful will, that the grant of probate may be revoked, and that it may be declared that the plaintiffs as heirs of the deceased are entitled to the estate left by her and that the same may be handed over to them, and for other reliefs. On 22nd August 1932, the plaintiffs took out a notice of motion for an order revoking the grant of probate and for appointment of a receiver and for injunction. In the argument a preliminary point was raised on behalf of the defendant, namely whether the High Court in the exercise of its ordinary original civil jurisdiction had jurisdiction to try the suit, as it contained a prayer for revocation of probate which was granted by this Court in the exer ise of its testamentary and intestate jurisdiction. The defendant contended that the suit and the notice of motion should be dismissed. The suit was accordingly set down on the board for argument on this preliminary point.

It was contended on behalf of the defendant that if the grant of probate was to be contested, it must be contested before the Court sitting as a Court of Probate, that is, sitting on the testamentary side in the exercise of its testamentary and intestate jurisdiction, and not in the exercise of its ordinary civil jurisdiction. The provisions of the law regarding the grant of probate and letters of administration to the estate of a deceased person are to be found in the Succession Act, 1925. Ch. 1 of Part 9 deals with the grant of probate and letters of administration. Ch. 3 deals with the alteration and revocation of grants, and Ch. 4, with the practice in granting and revoking probate and letters of administration. An application for probate of a will is to be made by petition to the High Court, or under S. 264 of the Act to the District Judge in all cases falling within his district. The application to the High Court for probate must be made by petition in form No. 83, and an application for letters of administration must also be made by petition in form No. 88 of the High Court Rules and Forms. Such petition is intituled.

"In the High Court of Judicature at Bombay Testamentary and Intestate Jurisdiction."

If the application is unopposed, the grant from the Registry follows as a matter of course, and is drawn up by the Prothonotary and Senior Master of the Court. If it is opposed, a caveat is filed, and on an affidavit in support of the caveat being filed the proceedings are turned into a suit, and the suit is numbered. There are separate numbers for suits filed on the Testamentary Side of the High Court. The grant of probate or letters of administration or the refusal thereof depends upon the result of the suit. It is clear therefore that the grant issues from the High Court in the exercise of its testamentary and intestate jurisdiction, and when an application is made to revoke the grant, the question arises whether such an application can be made only by way of proceedings instituted in the Court out of which the grant issued, or whether it can also be made to the Court exercising its original civil jurisdiction. Counsel for the plaintiffs, by way of analogy only, as I take it, referred in the first place to the jurisdiction of the High Court of Judicature in England.

In England, before the Judicature Act was passed in 1873, it was held that when the Court having jurisdiction, that is, the spiritual or Ecclesiastical Court, granted probate or letters of administration, the probate or letters, so long as they were unrepealed, could not be impeached in the temporal Courts: see *Allen* v. *Dundas* (1) and *Attorney-General* v. *Partington* (2). By the Judicature Act of 1873 the several Courts exercising different functions were consolidated together into one Supreme Court of Judicature of England, divided into Her Majesty's High Court of Justice and Her Majesty's Court of Appeal, and under S 16 of that Act, the jurisdiction vested in or capable of being exercised by such

1. (1789) 3 T R 125.
2. (1864) 3 H & C 193=33 L J Ex 281=10 Jur N S 825=10 L T 751=13 W R 54.

Courts, which included the Court of Probate, was transferred to or vested in the High Court of Judicature. Other Judicature Acts were passed after 1873, and now under the Supreme Court of Judicature (Consolidated) Act of 1925, which consolidated the Judicature Acts from 1873 to 1910 and other enactments relating to the Supreme Court and the administration of justice thereunder, there is also one Supreme Court of Judicature in England, similarly divided into the High Court and the Court of Appeal.

Under S. 4 (1) of the Act of 1925, as amended in 1928, the High Court is to have three divisions "for the more convenient despatch of business," namely the Chancery Division, the King's Bench Division, and the Probate, Divorce and Admiralty Division. S. 4 (4) provides that without prejudice to the provisions of the Act relating to the distribution of business of the High Court, all jurisdiction vested in the High Court under the Act belongs to all the divisions alike. Ss. 55 and 56, regulate the distribution of business and the assignment of business to the three divisions. The result, therefore is that a Judge belonging to any division has jurisdiction to hear any action within the jurisdiction of the High Court. He may retain and deal with an action wrongly assigned to his division, or he may refuse to exercise his jurisdiction over it, and under S. 58 transfer it to the proper division where it can be more conveniently and appropriately dealt with. In *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ltd.* (3) Lord Dunedin pointed out that the Chancery Division was not in the strictest sense of the word a separate Court from the High Court of Justice, and at p. 460 Lord Wrenbury stated that the High Court of Justice was after all one Court although divided into divisions and with certain business assigned to one division to the exclusion of another.

In *Pinney* v. *Hunt* (4), Jessell, M. R., held that a Judge of the Chancery Division had under the Judicature Act jurisdiction to grant probate, but that it would not be using a sound discretion in exercising it, apart from the inconvenience caused by allowing the peculiar business of the Probate Division to be distributed over all the other divisions. In *In re Ivory Hankin* v. *Turner* (5), letters of administration were granted to the brother of the deceased. Plaintiff then commenced an action in the Chancery Division for the administration of the estate of the deceased, alleging that he was the next of kin. It was held by Lush, J., that letters of administration were conclusive that defendant was one of the next of kin, and the proper course for the plaintiff was to apply to the Probate Court to have the letters of administration recalled. These decisions were followed in *Bradford* v. *Young* (6), in which it was held that though the Chancery Division might have jurisdiction to recall the probate of a will, it ought not as a general rule to exercise it. There is also an observation of the Lord Chancellor in *Stead* v. *Smith* (7), that:

"it will always be borne in mind that all legal proceedings ought to be so far as practicable localized for the convenience of those concerned either in litigation or in any other legal business which may come before any officers of the Court."

In India the jurisdiction of the High Courts and of the Judges comprising the Courts is determined (1) by the High Courts Act of 1861, also known as the Charter Act (24 and 25 Vic. c. 104) which was an Act for establishing High Courts of Judicature in India; (2) by the Letters Patent issued thereunder, and (3) by the Rules framed by each High Court under the authority conferred upon it by the Act. S. 9 of the Act provides that the Court "shall have and exercise" all such jurisdiction as Her Majesty may by Letters Patent grant and direct, the Court being comprised of the Chief Justice and the Judges appointed by Her Majesty. S. 13 empowers the Court to make Rules providing

"for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice."

The High Court of Bombay was established under the Letters Patent, and when established it was to have and

3. (1921) 2 A C 438=90 L J K B 1089=126 L T 35=37 T L R 919=65 S J 733.
4. (1877) 6 Ch D 98=26 W R 69.
5. (1878) 10 Ch D 372=39 L T 285=27 W R 20.
6. (1884) 26 Ch D 656=54 L J Ch 96=32 W R 901=50 L T 707.
7. (1911) A C 688=81 L J K B 68=55 S J 616=105 L T 120.

to exercise all such Civil, Criminal, Admiralty, and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency as Her Majesty might by the Letters Patent, grant and direct. Cl. 34, Letters Patent provides for the testamentary and intestate jurisdiction of the High Court of Bombay. Under S. 106, Government of India Act, 1915, the High Courts to have such are jurisdictions, original and appellate, as are vested in them by Letters Patent, and S. 108 similarly empowers the High Court to make its own rules for the exercise by one or more Judges or by Division Courts of the original and appellate jurisdiction vested in it. In the exercise of the power contained in S. 13, which I have referred to above, the High Court of Bombay has made Rules for the exercise of jurisdiction by the Judges both on the original and the appellate side, but the jurisdiction itself, apart from its exercise, is conferred by the Crown by Letters Patent. I may here also mention that under S. 129, Civil P. C., the High Court is empowered to make rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction. The rules framed by the High Court are collected together and are headed

"Rules and Forms of the High Court of Judicature at Bombay on the original side in its several jurisdictions."

Rule 58 provides that:

"any Judge of the High Court may, subject to any rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction vested in the High Court on its original side."

Rule 60 empowers the Chief Justice to assign the different suits, matters and proceedings referred to therein to such Judges as he may from time to time appoint. Reading the two rules together the effect is that any Judge can exercise all or any part of the original jurisdiction of the Court, that is, the jurisdiction vested in the High Court on its original side, but for the sake of convenience "in the due administration of justice" different suits, proceedings and matters on that side are assigned to different Judges. Amongst these are testamentary and intestate matters, and Rr. 583 to 649 of the High Court Rules regulate the procedure of the Court in dealing with those matters. It was argued on behalf of the defendant that the words "for the more convenient despatch of business" occurring in S. 4, Judicature Act, 1925, are not found in either of these two rules, but under S. 13, Indian High Courts Act, to which I have referred above, the rules are to be made for the exercise of jurisdiction by single Judges or Division Courts in such manner as may appear to the Court "to be convenient for the due administration of justice." The "several jurisdictions" on the original side for which rules have been made have been separated because of this convenience in the due administration of justice, but they are not exclusive of one another. They are each of them parts of the jurisdiction vested in the High Court on its original side. In my opinion therefore every Judge of the High Court by virtue of his appointment is competent to discharge all the functions connected with the High Court on its original side, that is, he has full powers to exercise all or any part of the jurisdiction vested in the High Court on its original side. The hearing and determination of testamentary and intestate matters form a part of that jurisdiction, and therefore any Judge may exercise it, subject only to the assignment of business under R. 60 for the sake of convenience in the due administration of justice. I may state here that Mirza, J., in *Tilak* v. *Nene* (8), has also expressed a similar opinion.

Counsel for the defendant however relied on the Full Bench decision in *Narayan Vithal* v. *Jankibai* (9), in which the majority of the Judges constituting the Full Bench held that it was not competent for a single Judge of the High Court in the exercise of its ordinary original civil jurisdiction to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil, unless authorized so to do by rules. Batchelor, J., delivering the judgment of the majority of the Judges, observed as follows (p. 620):

"The intent and effect of these provisions seem to me to be that the jurisdiction conferred is conferred on the Court as a body: it is the Court which is to 'have and exercise' the jurisdiction granted; but, inasmuch as it would not

8. O. C. J. Suit No 2490 of 1923, Decided on 2nd February 1922, by Mirza, J.
9. (1915) 39 Bom 604=30 I C 560.

be 'convenient for the due administration of justice' that the entire Court should have to sit for the valid determination of every suit and appeal and application, power is given to the Court to make rules for the exercise of the Court's jurisdiction by one or more Judges within the limits and subject to the conditions prescribed by the Rules. The powers so delegated would thus fix the limit within which such Judge or Judges would be competent to exercise the Court's jurisdiction, and any order made by a Judge or Judges in excess of this authority would be void as being beyond the jurisdiction which the Judge or Judges were legally authorized to exercise.''

It was contended that when certain powers were delegated to a Judge, sitting, for instance, on the original side, those powers fixed the limits within which he was competent to exercise that jurisdiction, and an order made by him in excess of the authority would be void as being beyond the jurisdiction he was legally authorized to exercise. Accordingly it was argued. that an order made by a Judge sitting on the original side for revocation of probate of a will granted by the Court in the exercise of its testamentary and intestate jurisdiction would be void. In my opinion however this inference does not follow. What the Court was there considering was whether a Judge sitting alone was entitled to exercise the function of the High Court in its appellate jurisdiction. Such a deligation to a single Judge could only be effected by a rule or rules of the High Court, and there was no such rule, so that the order made was in the exercise of a jurisdiction which the Judge could not lawfully exercise. The local jurisdiction of the Judge on the original side being confined to the limits of the Town and Island of Bombay, an order for stay of a suit in a subordinate Court in the mofussil appertains to the appellate side of the High Court, and the jurisdiction on the appellate side is, according to the rules, unless otherwise provided or ordered, to be exercised by a Division Court consisting of two Judges. The exercise of the jurisdiction of the Court in testamentary and intestate matters is assigned to a Judge for convenience in the due administration of justice, but there is no rule which lays down that the functions of such a Judge can be exercised by that Judge alone, and no other. In fact as I have already pointed out, R. 58 vests the whole or part of the jurisdiction vested in the original side of the Court in every Judge, subject to the division of work mentioned in R. 60.

It was next argued that an order made by a competent Court in the exercise of its probate jurisdiction, or the testamentary and intestate jurisdiction, is a judgment in rem under S. 41, Evidence Act, and is final, until it is set aside. S. 273, Succession Act, lays down that probate shall be conclusive as to the representative title against all debtors of the deceased, and probate granted by a High Court shall have the effect mentioned in the section throughout the whole of British India, unless otherwise directed by the grant. When probate is granted, it operates upon the whole estate and establishes the will from the death of the testator. Probate is conclusive evidence not only of the factum but also of the validity of the will. Plaintiffs now seek to revoke the probate in a suit filed on the original side.

There are no doubt other reliefs also in this suit which the Court on its original side can grant; but they depend upon the revocation of the probate. Unless probate is revoked for 'just cause'' under S. 263, Succession Act, the Court cannot give a declaration that the will is null and void, that the plaintiffs are the heirs of the deceased, and that the estate should be handed over to them. So long as the probate is unrevoked, this Court cannot declare the plaintiffs to be the heirs of the deceased. They can only be heirs as on an intestacy, and probate being granted, the will is established, and there is no intestacy. It is, therefore, in my opinion, incumbent on the plaintiffs before proceeding further to have the grant revoked. The question is whether the plaintiffs can have the grant revoked by this Court, that is, the Court sitting on the original side. It was held in *Komollochun Dutt* v. *Nilruttun Mundle* (10) that where it was alleged that a probate had been wrongly granted, the proper course to pursue was to apply to the Court which granted the probate to revoke it. That grant must be contested before the Court sitting as a Court of Probate and not in the exercise of its ordinary civil jurisdiction. It was pointed out by Markby J., at p. 363 that:

10. (1878) 4 Cal 360=4 C L R 175.

"it would lead to the greatest confusion if the validity of the will could be questioned in a civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The executor would be exposed to endless litigation, and he would never be safe in dealing with the property of the deceased."

It must also be remembered that under S. 296, Succession Act, when the grant is revoked, the person to whom the grant was made has to return it to the Court which made the grant. Counsel for the defendant relied on *Kishorbhai Revadas* v. *Ranchodia Dhulia* (11) but there it was held that the District Court was competent to decide questions of fraud or collusion vitiating the grant of probate and alone had jurisdiction to revoke the probate, and the Subordinate Court had no jurisdiction in probate matters. Similarly in *Sheoparsan Singh* v. *Ramnandan Singh* (12) it was held that the will having been affirmed in a Court exercising appropriate jurisdiction, the propriety of that decision could not be impugned by a Court exercising any other jurisdiction. Probate was there granted by the District Judge of Mozuffarpur, and the suit was filed in the Court of the Subordinate Judge for a declaration that the plaintiffs were the nearest reversionary heirs of the deceased in order that that declaration may enable them to apply for revocation of the letters of administration. The suit was for a declaration under S. 42, Specific Relief Act, and it was held that it was misconceived because so long as the probate stood, the plaintiff's were not entitled to any legal character or any right to property as required by S. 42, Specific Relief Act. The Court was therefore incompetent to proceed with the hearing and determination of the suit, and it was dismissed. In *Annada Charan* v. *Atul Chandra* (13) it was held that a civil Court had no jurisdiction to declare the grant of letters of administration null and void. The only "proper Court" to set aside the grant was the probate Court. Even, therefore, if this Court sitting on the original side has jurisdiction to deal with the question of revocation of probate, the Court will not exercise it, as it is not the "proper Court." In the same judgment of the Privy Council there is a remark by Sir Lawrence Jenkins at p. 97 that:

"it is not suggested that in this litigation the testamentary jurisdiction is, or can be, invoked, and yet there can be no doubt that this suit is an attempt to evade or annul the adjudication in the testamentary suit, and nothing more."

In the present suit there is also an attempt to annul the grant of probate, and therefore the proper course for the plaintiffs was to have applied to the "proper Court," that is, the Court which deals with testamentary and intestate matters in the High Court. In England if a suit was filed in a wrong division, the suit was not liable to be dismissed, but if it could be transferred, the proper course was to transfer it to the appropriate division. The English law and English procedure are of course only a guide to our Courts in India. It has been held by the Privy Council in *Ramanandi Kuer* v. *Kalawati Kuer* (14) that testamentary cases must be decided in India with reference to the relevant provisions of the Indian legislature uninfluenced by considerations derived from the English law on the subject, but R. 639, High Court Rules, provides that when necessary the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed. In my opinion this suit cannot be transferred to the Court dealing with testamentary and intestate matters, nor can the one relief appropriate to that division be so transferred. It was argued by counsel for the plaintiffs that such a course would lead to multiplicity of proceedings, and the estate was small; but, in my opinion, the plaintiffs are themselves to blame for having come to the wrong side of the High Court for relief in respect of the revocation of probate. Legal proceedings have to be localized in the proper Courts, and to be taken on the proper side. Moreover, the procedure for revocation of probate is not by suit, but by petition. However small the estate may be, there can be no question of denial of justice, because the plaintiffs can file a petition on the testamentary and intestate jurisdiction and establish the very facts on which they rely in the suit for revocation of probate.

11. A I R 1914 Bom 114=38 Bom 427.
12. A I R 1916 P C 78=43 Cal 694 (P C).
13. A I R 1920 Cal 159=54 I C 197.
14. A I R 1928 P C 2=107 I C 14=55 I A 18=7 Pat 221 (P C).

The conclusion to which I have arrived is that the plaintiffs should take the necessary proceedings, if so advised, to have the probate revoked by the Court in the exercise of its testamentary and intestate jurisdiction by filing a separate petition; the petition to be filed within a week. This suit will be stayed and the notice of motion adjourned. Liberty to the parties to apply to have the suit set down for hearing and final disposal and to bring on the notice of motion in default of proceedings being taken as aforesaid; in the event of proceedings being taken to have the suit so set down within a week after the Court sitting on the testamentary and intestate jurisdiction has pronounced judgment on the petition for revocation. I have heard counsel on the question of costs of this hearing on the preliminary point. On the one hand the plaintiffs have adopted proceedings in the wrong Court by praying for revocation of probate among the reliefs sought in a suit filed on the original side. On the other hand I am of opinion that the suit is not liable on that ground to be dismissed as was contended by counsel for the defendant. The fairest order for costs that I can make is that the plaintiffs do bear their own costs of this hearing. The costs of the defendant will be costs in the cause.

K.S. *Order accordingly.*

A. I. R. 1933 Bombay 475

SHINGNE, J.

Narayan Balkrishna Thakirdesai — Appellant.

v.

Vaman Narain Bhave and *others*— Respondents.

Second Appeal No. 807 of 1930, Decided on 11th July 1933, against decision of Dist. Judge, Ratnagiri, in Appeal No. 181 of 1929.

(a) Bombay Khoti Settlement Act (1 of 1880), Ss. 9 and 10—S. 10 must be read with S. 9—Mere contract to sell will not attract operation of S. 10—Transfer of Property Act (1882), S. 54.

Section 10 will have to be read with S. 9 of the Act. A mere contract to sell will not be sufficient to amount to a transfer and will not attract the operation of S. 10 and place the land at the disposal of the khot: *AIR* 1924 *Bom* 459, *Dist.* [P 475 C 2]

(b) Bombay Khoti Settlement Act (1 of 1880), S 10—S. 10 must be construed strictly.

The provision in S. 10 is of a penal nature and must be construed strictly : *AIR* 1926 *Bom* 166, *Ref.* [P 476 C 1]

(c) Bombay Khoti Settlement Act (1 of 1880), S. 10—Whether S. 10 is enacted in interest of khot alone—*Quaere*.

Quaere.—Whether the provision in S. 10 was enacted in the interest of the khot alone or was meant for the benefit of both the khot and the occupancy tenant. [P 476 C 1]

P. V. Kane——for Appellant.

A. G. Desai—for Respondents.

Judgment.—The plaintiffs who are occupancy tenants of the suit lands brought this suit for possession of the lands alleging that the defendant was an annual tenant. The defendant set up permanent tenancy. Both the Courts found against him on the point. The finding is supported by evidence. It was contended that the finding was erroneous at law. I do not think that this contention should be allowed. It is clear from the evidence in the case that the lands had been let in 1864-65 to another tenant. This precludes the defendant from contending that the tenancy was ancient. Another point that was raised on behalf of the defendant (who is a khot of the village) was that the plaintiffs without the consent of the khot had agreed to sell the suit land to one Nilkanth Desai for Rs. 400, and in pursuance of the contract the consideration was paid to the plaintiffs. As to the payment of the consideration the evidence is not convincing, and even assuming that the amount was paid, it is admitted that the purchaser was not placed in possession of the property which continued to be with the plaintiff. It is also clear that no registered document of sale was passed. Mr. Kane for the defendant-appellant contended that the expression "does any act purporting to transfer such land" in S. 10, Khoti Settlement Act, includes the case of a contract to sell. In my judgment, this construction is not correct. S. 10, Khoti Settlement Act, will have to be read with S. 9 of the Act. S. 9 enacts that occupancy tenants' rights shall be heritable, but shall not be otherwise transferable without the consent of the khot unless in cases where the right of the transfer has been exercised or granted as mentioned in the section. S. 10 enacts that if the land in the holding of a privileged occupant lapses for failure of heirs, or is forfeited on the occupant's failure to pay the rent due in respect thereof, or that if any occupancy tenant resigns the land or any portion of the land in his holding or does any act

purporting to transfer such land or any portion thereof or any interest therein without the consent of the khot (except in the cases provided for in S. 9), such land shall be at the disposal of the khot.

Reading the two sections together, it is clear that what is intended is a completed transaction either by way of lapse, forfeiture, resignation or transfer, and the words "does any act purporting to transfer such land" do not include the case of a contract to sell. It may be that in the case of a contract to sell an occupancy holding, the managing khot may give consent to the transfer and the transaction will then be good: vide *Ibrahim* v. *Krishnaji* (1). If so, it will not be correct to allow the contention by Mr. Kane. It is not necessary to consider whether the provision in S. 10 was enacted in the interest of the khot alone or is meant for the benefit of both the khot and the occupancy tenants. The provision is however of a penal nature and must be construed strictly: *Krishnaji* v. *Gangaji* (2). Lastly, by S. 54, T. P. Act, a contract for the sale of immovable property does not of itself create any interest in the property agreed to be sold. It is therefore clear that a mere contract to sell will not be sufficient to amount to a transfer and will not attract the operation of S. 10 and place the land at the disposal of the khot. It may also be noted that the meaning given to the word "purport" in Webster's Dictionary does not go to the extent of supporting the argument advanced on behalf of the appellant. I therefore dismiss the appeal with costs.

K.S. *Appeal dismissed.*

1. AIR 1924 Bom 459=80 I C 458.
2. AIR 1926 Bom 166=93 I C 123=50 Bom 189.

A. I. R. 1933 Bombay 476

BEAUMONT, C. J. AND RANGNEKAR, J.

Sarafalli Mahomedalli—Appellant.

v.

Mahasukhbhai Jechandbhai—Respondent.

Letters Patent Appeal No. 6 of 1922, Decided on 13th April 1933, from decision of Barlee, J.

Civil P. C. (1908), O. 6, R. 17—Suit on promissory note—Cause of action on original loan giving rise to pro-note can be set up by amendment at trial or appeal—Promissory note.

The cause of action on a promissory note is distinct from the cause of action on the loan which gives rise to the promissory note. But those two distinct causes of action can be set up in the same suit by the original plaint. Hence if two alternative and inconsistent claims can be combined originally in the plaint there is no reason on principle, why they should not be combined at a later stage by amendment. Whether in any particular case, the amendmant is asked for at too late a stage or in circumstances which make it unfair to grant the leave, is another matter, but as a mere proposition of law there is no reason why amendment of this nature should not be allowed at the trial or even in appeal; *AIR* 1918 *P C* 146, *Rel. on.*; *AIR* 1922 *P C* 249, *Dist.*; *AIR* 1932 *Bom* 394, *Diss. from.* [P 477 C 1]

A. C. Amin and *U. L. Shah*—for Appellant.

H. V. Divatia—for Respondent.

Beaumont, C. J.—This is a second appeal brought under the Letters Patent from the decision of the District Judge of Broach and Panchmahals. The plaintiff sued the defendants for the balance of moneys due and the balance was secured by a promissory note dated 31st August 1926, signed by defendant 2. The plaintiff's case was that defendant 3 was a partner of defendant 2 and that he was liable for the amount due. The issues raised in the trial Court were: (1) whether defendant 3 was a partner of defendant 2 in the firm in question, and (2) whether defendant 3 was liable for the claim in suit. The trial Judge held that defendant 3 was a partner in the firm and that he was liable for the claim in suit. In the lower appellate Court it seems to have been assumed that the plaintiff's case was based on the promissory note and as the promissory note was signed only by defendant 2, the learned pleader for the plaintiff felt doubtful whether he could sustain the judgment against defendant 3 and he accordingly asked for leave to amend the plaint by claiming in the alternative the money due from defendant 3 on the dealings which resulted in the debt secured by the promissory note that is to say, he sought to claim in the alternative on the promissory note or for the consideration giving rise to the promissory note, and the learned District Judge gave leave to amend on certain terms as to costs. The question which we have to decide is whether that leave was properly granted. The learned District Judge did not decide the question in issue, but he referred the matter back to the trial Court. It has been strenuously argued before us that the learned District Judge had no right to give leave to amend and we have been

referred to various cases. Strong reliance is placed on the decision of Blackwell, J., in *Burjorji* v. *Hormusji* (1). The head-note in that case is:

"Where a suit is brought on a promissory note, it is not permissible to the Court at the trial of the suit to allow an amendment in order to entitle the plaintiff to sue on the original cause of action on the loan—that being a cause of action wholly distinct from the cause of action based upon the promissory note."

Now we are not concerned with the question whether in that case the learned Judge was right or wrong in refusing leave to amend, but if the learned Judge intended to lay down as a proposition of law that in a suit on a promissory note an amendment claiming in the alternative on the consideration for the note should never be allowed at the trial, I think, with great respect to the learned Judge, that his judgment cannot be supported. It is quite true, as the learned Judge points out, that the cause of action on the promissory note is distinct from the cause of action on the loan which gave rise to the promissory note. But it is equally true that those two distinct causes of action can be set up in the same suit by the original plaint. Authority for that proposition, if needed, is to be found in *Sadasuk Janki Das* v. *Kishan Pershad* (2), where the proposition is stated by Lord Buckmaster who delivered the opinion of the Privy Council. If two alternative and inconsistent claims can be combined originally in the plaint, I see no reason on principle why they should not be combined at a later stage by amendment. Whether in any particular case the amendment is asked for at too late a stage, or in circumstances which make it unfair to grant the leave, is another matter, but as a mere proposition of law I see no reason why an amendment of this nature should not be allowed at the trial or even in appeal. Blackwell, J., based his judgment in that case on the decision of the Privy Council in *Ma Shwe Mya* v. *Maung Mo Hnaung* (3). But that was a very different case. In that case the original suit was upon a contract made in 1912, and it was sought by amendment to base the cause of action on a totally different contract made in 1903. The whole subject-matter of dispute was sought to be changed which is not the case in the present suit where the real subject-matter is the indebtedness of defendant 3. I think therefore that there is no objection in law to the amendment which the learned Judge allowed.

It was contended further that the claim on the loan was at the date of the amendment by limitation. That point was considered by the learned District Judge and he thought it not sufficient reason for refusing leave to amend. I am not sure that I agree with the learned Judge's view on that point, but as far as I can see it is extremely doubtful whether in fact the claim was barred. Moreover I am disposed to think that as a matter of fact the plaint is not limited to the claim on the promissory note. The plaint is not very clearly worded. It refers to dealings subsequent to the promissory note and on the whole, on the construction of the plaint, I think that it is a claim for balance of moneys due on the dealings between the parties and that the promissory note is only relied on as evidence of the amount due on the balance of the account. If that is right it is of course unnecessary to amend the plaint. But as the plaintiff asked for leave to amend whether that leave is necessary or not, he should, I think, be given leave. That being so we see no reason to interfere with the learned Judge's judgment. The appeal is dismissed with costs.

Rangnekar, J.—Mr. Amin objects to the leave granted by the learned Judge to amend the plaint on two grounds. The first ground is that the effect of allowing the amendment would be to deprive his client of the defence under the law of limitation. The second ground is that the effect of the amendment would be to introduce a totally new and inconsistent cause of action. The first answer is that it was not at all necessary for the plaintiff to amend the plaint, for it seems to me to be clear, on reading the plaint as a whole, that the plaintiff sued not on the promissory note but on dealings between him and the defendants, that is to say, on the original cause of action in respect of which the promissory note was passed.

The second contention is, in my opinion, untenable. The position is that

1. AIR 1932 Bom 394=138 I C 783.
2. AIR 1918 P C 146=50 I C 216=46 I A 33=46 Cal 663 (P C).
3. AIR 1922 P C 249=63 I C 914=48 I A 214=48 Cal 832 (P C).

the amendment was allowed in order to enable the plaintiff to plead, in the alternative, the original consideration, namely, the dealings between the parties. I see no objection to this. Mr. Amin relies on a decision of Blackwell, J., in *Burjorji* v. *Hormusji* (1). In that case the learned Judge seems to have held that in a suit based on a promissory note leave should not be granted to amend the plaint by pleading the original cause of action, as the causes of action are distinct. With all sincere respect to the learned Judge I am unable to accept the view which he has taken. Blackwell, J., referred to *Ma Shwe Mya* v. *Maung Mo Hnaung* (3) as an authority for the view which he took. But that case was decided on its facts, and I am unable to see that any proposition of law as such was laid down there. It is clear from the facts of that case that the amendment sought was based on a contract totally different from the contract on which the plaint was originally based. Now it is true that a cause of action based on dealings between the parties is distinct from that based on a promissory note passed for the amount due in respect of such dealings. But there is clear authority for the proposition that the plaintiff may "rely upon several different rights or claims alternatively although they may be inconsistent": see *Philipps* v. *Philipps* (4). I may also refer to the decision of the Privy Council in *Sadasuk Janki Das* v. *Kishan Pershad* (2). If, then, a plaintiff can set up inconsistent claims in the alternative in the plaint to start with, it is difficult to see why, on principle, he cannot be allowed to amend the plaint by pleading an inconsistent claim in the alternative at a later stage. Whether such an amendment should be allowed or not depends upon the circumstances of the case and various other considerations. In the present case however the application for amendment is to plead the original cause of action in the alternative. In this case the amendment was unnecessary, and that being so, the appeal fails and must be dismissed with costs.

K.S. *Appeal dismissed.*

4. (1878) 4 Q B D 127=48 L J Q B 135=27 W R 436=39 L T 556.

A. I. R. 1933 Bombay 478

BEAUMONT, C. J. AND N. J. WADIA, J.

Chhaganlal Ishwardas Shah — Petitioner.

v.

Emperor— Opposite Party.

Criminal Revn. Appln. No. 212 of 1933, 17th August 1933.

(a) Criminal Trial—Assessor—Dress worn by assessor which is not against rule of public decency nor intended to be insulting to Court—Judge cannot fine assessor — Penal Code (1860), S. 228.

There is no rule as to the dress of assessors, and where an assessor wears a particular dress, which does not offend against any rule of public decency nor is intended to be insulting to the Court, the Judge has no jurisdiction to fine the assessor as being improperly dressed. [P 479 C 1]

(b) Penal Code (1860), S. 228 — Criminal P. C (1898), S. 480—In order to bring case within these sections, intention to insult must be proved.

In order to bring a case within S. 228, Penal Code and S. 480, Criminal P. C. it must be shown that an accused intentionally offered an insult to the Court. [P 478 C 2]

U. L. Shah—for Petitioner.

B. G. Rao—for the Crown.

Beaumont, C. J. — In this case the petitioner was summoned to serve as an assessor in a sessions case in the Nadiad Sessions Court and he appeared in a dress consisting of a 'paheran', a cap and a scarf. The learned Sessions Judge thought that he was improperly dressed and fined him Rs. 3. In the reasons which the learned Sessions Judge gives for his order he says that an assessor ought to wear a coat, and that anybody not wearing a coat is improperly dressed. Well, that is rather a matter of taste. We have been shown what we are told is a paheran. My own opinion is that it looks better without a coat, than with one. But what we have to consider is not a question of taste, but whether the learned Sessions Judge had any jurisdiction to fine the assessor. There are no rules as to the dress to be worn by assessors, and this particular assessor stated to the Court that the dress he was wearing was his best dress and and the one in which he had appeared seven or eight times before as an assessor, and that it was the dress which he wore on ceremonial occasions. There is no evidence in answer to that and no reason for thinking the statement untrue. The Government Pleader suggests that the order of the learned Sessions Judge may be justified under S. 228, I. P. C., and S. 480, Criminal P. C But

in order to bring the case within those sections it must be shown that the assessor intentionally offered an insult to the Court. If we accept his statement that he appeared in his best dress, it seems to me impossible to say that he intended to insult the Court by so doing. Even if his dress is to be regarded as somewhat neglige I should think it more likely that his intention was to insure his own comfort, than to insult the Court. In my opinion, therefore, there being no rule as to the dress of assessors, and there being no suggestion that this dress offends against any rule of public decency, or was intended to be insulting to the Court,' the learned Sessions Judge had no jurisdiction to fine the assessor. The order made by the learned Sessions Judge is, therefore, set aside, and the fine refunded.

N. J. Wadia, J.—I agree.

K.S. *Order set aside.*

* A. I. R. 1933 Bombay 479 (1)

BEAUMONT, C. J.

Emperor

v.

Mahomed Yusuf—Accused.

Criminal Case No. 26 of 1932, Decided on 2nd December 1932.

*** Evidence Act (1872), S. 33—Evidence of witness given before Coroner in enquiry into death—Death of such witness prior to enquiry before Magistrate—Evidence is not admissible under S. 33.**

An inquiry before the Coroner, although it may be a judicial proceeding, is not a proceeding between the prosecutor and the accused. The proceedings before the Coroner are merely an inquiry into the circumstances leading to the death of the person whose death is under inquiry, and it is impossible to say that the Crown is a party to those proceedings, even if it can be said that the accused is a party on the ground that he was during those proceedings a suspect. Hence the evidence given by a witness before a Coroner is not admissible under S. 33, if such witness dies prior to enquiry before Magistrate. [P 479 C 2]

Jamshed Kanga and *Gomes*—for the Crown.

S. D. Dhondy—for Accused.

Order.—The point for decision in this case is whether the evidence of a witness who was called before the Coroner, who was enquiring into the death of a man with whose murder the accused is charged, can be taken in evidence in this Court under S. 33, Evidence Act, the particular witness having died, and died prior to the enquiry before the Magistrate, so that he was not called before the Magistrate.

Section 33 provides that evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness (amongst other things) is dead; and then it is provided that "the proceeding was between the same parties or their representatives in interest." Then the explanation provides that a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section. In my opinion the inquiry before the Coroner, although it may be a judicial proceeding, is not a proceeding between the prosecutor and the accused. The proceedings before the Coroner are merely an inquiry into the circumstances leading to the death of the person whose death is under inquiry, and it is impossible to say that the Crown is a party to those proceedings, even if it can be said that the accused is a party on the ground that he was during those proceedings a suspect. In my opinion the evidence is not admissible.

K.S. *Order accordingly.*

A. I. R. 1933 Bombay 479 (2)

BEAUMONT, C. J. AND N. J. WADIA, J.

Emperor

v.

Akbarali Karimbhai—Accused.

Criminal Appeals Nos. 183, 184 and 133 of 1933, Decided on 28th July 1933.

(a) Evidence Act (1872), S. 32 — Simply because dying declaration is false in some part, it should not be disregarded as a whole.

Once a declaration falls within S. 32, it becomes relevant evidence, and the Court must judge of the weight of that evidence on exactly the same principles as those upon which it acts in judging of the weight of other types of evidence. Of course the Court has always to bear in mind that a declaration admissible under S. 32 is not made on oath, and is not the subject of cross-examination, and therefore it is a weaker type of evidence than the evidence given by a witness in the witness box, and if a Judge thought that part of a dying declaration was deliberately false, it is no doubt very improbable that in practice he would act upon the declaration, at any rate without very definite corroboration. But it cannot be said that because it transpires that something in a dying declaration is false, therefore the whole declaration must necessarily be disregarded. [P 481 C 1]

(b) Evidence Act (1872), S. 32—Corroboration of dying declaration is not necessary as a rule of law—But declaration not made in

expectation of immediate death and not made in presence of accused requires corroboration as a rule of prudence.

There is no rule of law which requires that a dying declaration should not be acted upon, unless it is corroborated. But the evidential value of a declaration relevant under S. 32 varies very much in accordance with the circumstances in which it is made. But generally speaking, and as a rule of prudence, a declaration, relevant under S. 32, but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon, unless there is some reliable corroboration; and that rule applies with extra force in a case where there is a good deal of evidence which is deliberately false. [P 481 C 1,2]

(c) Evidence Act (1872), S. 32—Dying declaration is relevant under S. 32 even though maker does not expect to die.

A dying declaration may be relevant under S. 32, although the man who makes it does not expect to die. [P 481 C 2]

Jamshed Kanga and *B. G. Rao*—for the Crown.

C. H. Carden Noad, R. F. S. Talyarkhan and *U. L. Shah*—for Accused.

Facts.—A certain Badruddin Nurbhai met with violent death. Three nephews of Badruddin, were charged with the offence, along with their servant Akbarali. The prosecution evidence consisted of eye-witnesses, dying declarations made by Badruddin and certain articles found in the house of the accused. The trial Judge discarded the evidence of the eye-witnesses as unreliable, and did not attach much weight to the finding of some of the articles. He relied on the dying declarations made by the deceased for the following reasons: "A dying declaration is evidence and it is open to a Court if it is prepared to act upon it to convict upon it alone. Looking however to the fact that after all an accused person does not usually have an opportunity of testing it by cross-examination, it is usual to be cautious in convicting upon that dying declaration alone. In this case however a number of factors from which a dying declaration may suffer are absent." Accused 1 and 4 were convicted of an offence punishable under S. 304, Cl. 1, Penal Code, and were sentenced to rigorous imprisonment for seven and four years respectively. Accused 2 and 3 were acquitted and discharged. The convicted accused appealed against their conviction and sentence, and the Government appealed against the order of acquittal. The Government also applied for enhancement of sentences passed upon accused 1 and 4.

Beaumont, C. J.—(After discussing the evidence of the eye-witnesses His Lordship proceeded:) Then the next evidence to which I would refer is the dying declarations. The declarations made to the doctor, to the Sub-Inspector of Police and to the Deputy Superintendent of Police were unquestionably made. Whether earlier declarations were made to people who came to the assistance of the deceased is perhaps more doubtful. The defence theory is that, although these declarations were made, they were the result of a deliberate plot concocted by the deceased and his friends between the time of the assault and the time of the arrival of Dr. Taherali, that is to say, in about half an hour. The view of the defence is that probably the attack was made by some robber who got away and that the deceased having then his relations and friends round him decided to make the best of a bad job and to make a false charge of assault against his enemies. Why on that theory he should have included accused 4, who is a servant of his enemies, I am not clear. It is, I think, very difficult indeed to accept that theory. If in fact the deceased had been attacked by some outside party who had run away, the natural feeling of the deceased would be a desire that the miscreant should be caught, and it seems to me hardly conceivable that within a few minutes after the assault the deceased should be committing himself to a story which entirely exculpated the real criminal for the sake of inculpating people with whom he had a civil quarrel but who for aught he knew might be well able to etablish an alibi and prove their innocence of this particular assault.

There is no evidence of this theory of robbery except that of Ex. 53, Kalu Dalu. His evidence is rather mysterious. He was called by the Crown as a Panch, but in cross-examination he volunteered information that he heard the assault on the deceased and he went out in the road and he then found accused 2 and 4 helping the deceased and the deceased alleging that he had been robbed. The learned Judge again does not tell us what view he formed as to the demeanour of Kalu Dalu in the box. He rejects his evidence because it refers to the theory of robbery which the learned Judge thinks improbable. I should have been glad to know whether the learned Judge

thought that this witness was a reliable type of witness or not. However I am not disposed to attach any very great importance to his evidence. The learned Judge and the assessors in effect accepted as true the dying declarations in part, but rejected them in part, and Mr. Carden Noad for the defence has argued that in law they were wrong in doing that, and he has cited in support of his contention the case of *Emperor* v. *Premananda Dutt* (1). In that case Mukerji, J., (with whom Greaves, J., agreed (at p. 1003 (of 52 *Cal.*) says this:

"In my opinion a dying declaration stands upon a widely different footing from the testimony of a witness given in Court. In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisement of evidence is very often unsafe. As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question; there must be absolute guarantee of the accuracy of the record and the truth of the entire statement before it can be acted upon."

I am not prepared to accept that statement as an accurate proposition of law, and I am unable to see the particular distinction which the learned Judge draws between a dying declaration and other forms of evidence. What S. 32, Evidence Act, does is to make certain declarations relevant which under the ordinary law would be irrelevant as being hearsay. Once you find that a declaration falls within S. 32 it becomes relevant evidence, and it seems to me that the Court must judge of the weight of that evidence on exactly the same principles as those upon which it acts in judging of the weight of other types of evidence. Of course the Court has always to bear in mind that a declaration admissible under S. 32 is not made on oath, and is not the subject of cross-examination, and therefore it is a weaker type of evidence than the evidence given by a witness in the witness-box, and if a Judge thought that part of a dying declaration was deliberately false it is no doubt very improbable that in practice he would act upon the other part of the declaration, at any rate without very definite corroboration. But I am not prepared to accede to the view that because it transpires that something in a dying declaration is false therefore the whole declaration must necessarily be disregarded.

The learned Advocate-General argues that corroboration of a dying declaration is not necessary, and I agree with him that there is no rule of law which requires that a dying declaration should not be acted upon unless it is corroborated. But the evidential value of a declaration relevant under S. 32, Evidence Act, varies very much in accordance with the circumstances in which it is made. If it is what would be called a dying declaration under English law, that is to say, a declaration made by a man in imminent expectation of death, then it certainly has a special sanction attached to it, because the law recognises that it is unlikely that a man will be willing to leave this world with a lie upon his lips. But a dying declaration may be relevant under S. 32 although the man who makes it does not expect to die, and it is, I think, clear on the evidence in this case that neither the deceased, nor the doctors who were attending him, nor the police, had any anticipation that he was about to die. Therefore no particular sanction attaches to the declarations in this case. Generally speaking, and as a rule of prudence, I am of opinion that a declaration, relevant under S. 32, but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration; and that rule applies with extra force in a case like the present where I am satisfied that there is a good deal of evidence which is deliberately false, and where both the learned Judge and the assessors do not accept the dying declaration as to one of the accused.

They think that as accused 3 came back from Nadiad suffering from asthma and arrived at his house a very few moments before the assault he cannot be supposed to have taken part in it. To allow the appeal of the Crown against the acquittal of accused 2 and 3 we shall really have to rule that the trial Judge and the assessors were bound to act on the dying declarations. (His Lordship dealt with the other matters of the case, and the accused were acquitted and discharged.) A concurring but separate judgment was delivered by N. J. Wadia, J.,

K.S. *Accused acquitted.*

(1) AIR 1925 Cal 876=52 Cal 987=88 I C 1000.

A. I. R. 1933 Bombay 482

BEAUMONT, C. J. AND N. J. WADIA, J.

Shankarshet Ramshet Uravane — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No 206 of 1933, Decided on 16th August 1933, from Asst. Sess. Judge, Poona.

(a) Criminal P. C. (1898), S. 439—High Court has widest powers of revision—Judges should not lay down rules restricting such power.

The Criminal P. C. confers the widest powers of revision upon the High Court and Judges should not seek to lay down rules which confine that discretion in a manner in which the legislature has not seen fit to confine it. [P 482 C 2]

(b) Criminal P. C. (1898), S. 439—Accused can contend in revision that he has been convicted on tainted evidence alone.

It is clearly open to an accused person in revision to contend that he has been convicted on the strength of tainted evidence and tainted evidence only, and that it is not the practise to convict on such evidence; and if such contention is established the Court should interfere. [P 482 C 2]

(c) Criminal Trial—Approver's evidence—Corroboratory evidence need not directly connect accused with offence—Evidence Act (1872), Ss. 114 (b) and 133.

It is not necessary that the evidence corroborating the story of an approver or an accomplice should be evidence which directly connects the accused with the offence; but there must be some evidence which tends to show that the story of the approver or accomplice is true in so far as it relates to the accused. [P 483 C 1, 2]

(d) Criminal Trial—Evidence of approver—A circumstance cannot furnish corroboration if it is susceptible of innocent explanation—Evidence Act (1872), Ss. 114 (b) and 133.

A circumstance cannot furnish corroboration of the story of an accomplice against an individual accused, if either it has no criminal significance apart from details of the accomplice's story which are not themselves proved by independent evidence, or the circumstance is susceptible of an innocent explanation which the Court accepts as probable. [P 483 C 2]

(e) Criminal Trial—Probability of approver's story is no ground for dispensing with corroborative evidence.

The mere fact that the approver's story is a very probable one is no reason for dispensing with the rule that such evidence requires independent corroboration: *AIR* 1933 *Bom* 24, *Ref.* [P 484 C 1]

C. H. Carden Noad and *S. R. Parulekar*—for Petitioner.

B. G. Rao—for the Crown.

Beaumont, C. J.—These are applications in revision in which the two accused ask us to interfere with their conviction under S. 201, I. P. C., that is to say, for concealing evidence of an offence. The ground on which the accused ask us to interfere is that, as they say, the only evidence against them is that of an accomplice, and that there is no sufficient corroboration of that evidence such as the Court normally requires. At the outset the learned Government Pleader referred us to the case of *Emperor* v. *Lallubhai* (1), in which it was laid down that a conviction will not be disturbed by the High Court under its revisional jurisdiction on the mere ground that the rule of practice which requires that the evidence of an accomplice should be corroborated has not been adhered to by the Court which has convicted unless there are exceptional circumstances calling for the exercise of that jurisdiction in the interests of justice. The Criminal Procedure Code confers the widest powers of revision upon this Court, and I rather protest against Judges seeking to lay down rules which confine that discretion in a manner in which the legislature has not seen fit to confine it. I think myself that it is clearly open to an accused person in revision to contend that he has been convicted on the strength of tainted evidence and tainted evidence only, and that it is not the practice of this Court to convict on such evidence; and that if such contention is established the Court should interfere. I think therefore we must consider the case on its merits.

The principal evidence in the case is that of a man named Chima who was undoubtedly an accomplice. It appears that some time in May 1931—the exact date is not proved—a man named Bapusaheb, who is the son of accused 1, murdered his mistress named Sundrabai in a house in Poona occupied by accused 1 and Bapusaheb as part of the joint family property. Bapusaheb informed his wife Lilavati of the murder and made her assist him in cleaning the room and the knife used. Subsequently Lilavati was confined by Bapusaheb in this house for about six months, when she escaped and informed the police about the murder, and ultimately Bapusaheb was prosecuted and convicted and sentenced to transportation for life. The story of Chima as to the suppression of evidence of this murder comes shortly to this: he is a servant of accused 1 employed at a place called Vadgaon, some five or six miles from Poona, where ac

1. (1909) 10 Cr L J 433=3 I C 963.

cused 1 owns some fields and a building which is described as a bungalow, in which a man named Raghunath, who was some relation of accused 1, lived. Raghunath had died, so his evidence was not available. On the day of the offence, according to Chima, he had gone to Poona to accused 1's house to carry some wood; he had taken the bullock cart over, and that was sent back with another servant. In the course of the afternoon Chima was driven back to Vadgaon in a tonga in which accused 2, who is the servant of accused 1, was in the habit of driving his master; so that the three of them, accused 1, accused 2 and Chima, were driven out to Vadgoan, according to Chima's evidence, on the day of the offence. Then Chima was sent back to Poona with a bullock cart, as he says, in order to fetch manure, and accused 2 seems to have gone back to Poona by a lorry. Subsequently Chima and accused 2 helped to carry the body of the murdered woman which was wrapped in a carpet down the stairs, they placed it in the bullock cart under some manure, and took it out to Vadgaon, and then, according to Chima's evidence, they there buried it in a room in the bungalow under the express directions and superintendence of accused 1. Some six months later, Chima says, that accused 1 told him that Lilavati had informed the police about this murder and that the bones of the murdered woman must therefore be disposed of, and accordingly Chima and accused 2 dug up bones and threw them into the canal. Eventually bones of a woman were found in the canal, which bones were identified as those of the murdered woman, and some teeth which fitted into the skull found in the canal were found in the room of the bungalow where the body was said to have been first buried. Those facts undoubtedly tend to corroborate the general truth of Chima's story.

Now, both the trial Court and the lower appellate Court recognized that Chima is an accomplice, and that the rule of the Court is that the evidence of an accomplice requires some independent corroboration as against each accused, and both the Courts came to the conclusion that there was sufficient corroboration. The learned Government Pleader has contended that it is not necessary that the evidence corroborating the story of an approver or an accomplice should be evidence which directly connects the accused with the offence. I agree with that proposition, but there must be some evidence which tends to show that the story of the approver or accomplice is true in so far as it relates to the accused. For instance, if the story of an approver is that the accused took part in a murder and robbery and that he received part of the stolen goods, independent evidence that the property shown to have been stolen on the occasion of the offence is found with the accused would be corroboration of the approver's story against the accused, although the finding of stolen property is obviously not in itself evidence that the accused took part in a murder. As the learned Government Pleader points out, if the rule were that you must have independent evidence against the accused of the actual perpetration of the offence, it would come to this: that the approver's evidence can only be used by way of corroboration, and that is not the rule.

Now with regard to accused 1 the evidence of corroboration relied on by the lower Courts is, first of all, that there is independent evidence that accused 1 did on the day of the murder go to Vadgaon in the tonga, and that I think is so. But there is also evidence that accused 1 used to go out to Vadgaon every afternoon, and there is no direct evidence that he actually went into the bungalow at Vadgaon either on this day or any other occasion. He did not live there and presumably his reason for going to Vadgaon as a rule would be that he wanted to inspect the land. Mr. Carden Noad, who appears for accused 1, has contended as a proposition of law that a circumstance cannot furnish corroboration of the story of an accomplice against an individual accused if either it has no criminal significance apart from details of the accomplice's story which are not themselves proved by independent evidence, or the circumstance is susceptible of an innocent explanation which the Court accepts as probable. I think that proposition is sound. Applying it here, there is no criminal significance in accused 1, having gone to Vadgaon on the day of the offence unless we accept the story of the accomplice that he went there for the

purpose of disposing of the body, and his visit to Vadgaon is in itself capable of an innocent explanation because the evidence is that he went to Vadgaon every day at about the time on which he is alleged to have gone on the date of the offence. Therefore, it seems to me that the mere fact that the accused is shown to have gone to Vadgaon on the day of offence is no corroboration of the accomplice's story as to what the accused did when he got to Vadgaon.

Then it is said that all the circumstances of the case show that accused 1 must have been a party to the disposal of the body. No doubt there is force in that. Accused 1 was living with his son Bapusaheb, and if Bapusaheb, committed a murder and desired to dispose of the body on the accused's place at Vadgon, the probabilities are, having regard to the relationship between the parties, that Bapusaheb would take accused 1, his father, into his confidence, and would get him to make the necessary arrangements for the disposal of the body at Vadgaon. But the mere fact that the approver's story is a very probable one is no reason for dispensing with the rule that such evidence requires independent corroboration. That proposition was acted upon recently by this Court in *Emperor* v. *Allisab* (2) where it was laid down as a definite rule of prudence that the evidence of an accomplice should not be acted upon unless corroborated as against the particular accused in material respects, and that that rule should be applied however little reason there was to doubt the approver's story. I have no doubt that the strict application of that rule does sometimes result in a guilty person being acquitted, and this may be one of those cases. But on the other hand I am quite sure that if the rule were otherwise, the result would frequently be the conviction of innocent persons, because it is so easy for an approver or an accomplice, who is telling a story which is in substance true, and therefore not capable of being shaken in cross-examination, to introduce into that story the names of innocent persons along with the guilty. In my view there is really no corroboration of the story of Chima as against accused 1. It is conceivable that the relations between Bapusaheb and his father were not cordial, and that the arrangements for the disposal of the body were made by Bapusaheb with the two servants, who would no doubt have to act in collusion with the man who was living at the bungalow, but that their instructions were to keep matters from the knowledge of accused 1. It is possible that accused 1 knew nothing about the disposal of the body, although I quite agree with the learned Sessions Judge that the probabilities of the case are all the other way. However in my judgment mere probability of guilt is not any corroboration of the approver's story. I think therefore that in the case of accused 1 we must set aside the conviction and sentence and allow his application.

The case of accused 2 is different, because there is undoubtedly as against him the evidence of Lilavati, the wife of Bapusaheb, who says definitely in her evidence that Chima and accused 2 brought down the murdered woman's corpse tied in a carpet and that they carried it to the back of the house where the cart was waiting. The trial Court and the lower appellate Court having accepted that evidence, and it being evidence of a nature on which they could properly act, there is I think no ground on which we can properly interfere in revision. I think therefore that in the case of accused 2 we must dismiss the application. With regard to the sentence on accused 2, namely 18 months' rigorous imprisonment, we are asked to reduce that. I have no doubt that accused 2 was in a difficult position and that pressure was brought to bear upon him by his master. But it seems to me that the offence was a very serious one and servants must learn to resist this sort of pressure. There is I think no ground on which we can reduce the sentence. Accused 1 acquitted and ordered to be set at liberty. Fine, if paid, to be refunded.

N. J. Wadia J.—I agree. It has been admitted by both the lower Courts that as far as appellant 1 is concerned the case rests solely on the evidence of the accomplice Chima. With regard to appellant 2, Chima's evidence is supported by that of Lilavati. The question whether Lilavati's evidence is or is not reliable is not one which we could con-

2. A I R 1933 Bom 24=141 I C 347=34 Cr L J 136.

sider in revision though if I had to give an opinion I would have no hesitation in saying that on this point it is quite reliable. There is therefore no reason to justify us in interfering with the conviction of appellant 2. As regards appellant 1 both the Courts have admitted the necessity of corroboration of the evidence of the accomplice. They have also realized that that corroboration must not merely be such as to prove generally the truth of the approver's story but such as would connect appellant 1 with the crime. The circumstances on which the lower Courts have relied as affording corroboration do not, in my opinion, carry the case against appellant 1 beyond providing very strong ground for suspicion that he must have been concerned in the offence. All that can be said against him is that the bungalow or farm-shed in which Sundrabai's body was first buried was on the appellant's own land and that he used to visit this land every day, that as the disposal of the dead body took two days, and as some months later the body was again exhumed from the room in the bungalow in which it had been buried, it is unlikely in the extreme that accused 2 and Chima, who were servants of accused 1, would have done these things without the consent or orders of their master, appellant 1. It is however to be remembered that appellant 1 and Bapusaheb were members of a joint family, that Bapusaheb himself was a grown-up person, and according to the evidence a brother or relative of appellant 1 named Raghunath was permanently staying in the Vadgaon bungalow. It is therefore not impossible that the body may have been buried in the bungalow under the orders and supervision of Bapusaheb or Raghunath without appellant 1 knowing about it or without his taking an active part in the business. Mere knowledge on his part that the body had been buried in the bungalow would not be sufficient for his conviction under S. 201. The utmost therefore, that the evidence would show would be that it is extremely improbable that appellant 1 could not have known of what had been done with regard to Sundrabai's body, and that it is extremely probable that he himself was concerned in what had been done. But such extreme probability cannot be considered as sufficient proof of his guilt. The accomplice's evidence would need corroboration under any circumstances according to the rule which the Courts have almost invariably followed. In this case the necessity of such corroboration is all the greater in view of the fact that Chima, according to the facts elicited in his own cross-examination and according to the evidence of the Police Sub Inspector, was a most unwilling witness when he was first examined by the police, and it was only by very slow degrees and by repeated questioning that the story with regard to the offence could be elicited from him. For these reasons I consider that the application of appellant 1 should be allowed and that of appellant 2 dismissed.

K.S. *Order accordingly.*

A. I. R. 1933 Bombay 485

BROOMFIELD AND DIVATIA, JJ.

Louis Philip Dias—Complainant.

v.

Mahadev Barik Raut—Accused.

Criminal Ref. 47 of 1933, Decided on 31st August 1933, from Addl. Sess. Judge, Thana.

(a) Criminal P. C. (1898), S. 435—Order refusing to stay proceedings.

A Magistrate's order declining to stay proceedings in his Court is an order covered by S 435. [P 486 C 2]

(b) Criminal P. C. (1898), Ss 438 and 439—Power to refer under S. 438 is not restricted to matters in revision under S. 439.

Power to refer under S. 438 is not limited to matters in revison under S. 439. It can be invoked in case of a matter of stay of proceedings. [P 486 C 2]

(c) Criminal Trial—Simultaneous civil and criminal proceedings—Question whether which proceeding, if at all, is to be stayed or both should be allowed to proceed depends on circumstances of each case.

Although, generally speaking, it is not desirable that civil and criminal litigation between the same parties on substantially the same facts should go on simultaneously, the mere fact that a civil case is pending is not by itself a sufficient ground for staying criminal proceedings. Yet criminal proceedings should be generally stayed if there are reasons to believe that they had been launched with the object of prejudicing the trial of the civil suit. In all such cases one of the matters which the Court has to consider is whether the object of the criminal proceedings is to prejudice the trial of the civil suit or to use them as a lever to coerce the accused into a compromise of the civil suit; and in that connection, the question, whether the criminal complaint or the civil suit was instituted first is always important. There is no hard and fast rule in the matter. The Court has to consider the circum-

stances of each particular case and decide on grounds of justice and expediency, whether it is proper that the criminal proceedings should be stayed or, it may be, that the civil proceedings should be stayed or that both should be allowed to take their course: *A I R* 1933 *Bom* 307, 30 *Mad* 226 and *A I R* 1932 *Bom* 57, *Ref.*
[P 487 C 1, 2]

G. N. Thakor, Nanu, Hormusji & Co. and *V. N. Chhatrapati*—for Complainant.

C. H. Carden Noad, J. R. Deshmukh and *C. B. Kulkarni*—for Accused Nos. 1 and 3 to 6.

Broomfield, J.—This is a reference by the Additional Sessions Judge of Thana recommending that the trial of a criminal complaint of cheating filed by one Louis Phillip Dias against six accused persons and pending in the Court of the First Class Magistrate of Bandra should be stayed pending the disposal of a civil suit filed by two of these accused persons against the complainant. The date of the criminal complaint was 7th March 1933. The plaint in the civil suit was presented on 8th March 1933, but appears to have been signed on the previous day.

The short facts of the case are these: The complainant, who according to his own description of himself, is a person much addicted to strong liquor, executed a sale-deed on 2nd November 1932, by which he purported to sell to accused 1 and 2 two acres and a half of land near Santa Cruz for Rs. 3,000. His allegation is that the six accused persons conspired together and took advantage of the unfortunate propensity which I have mentioned, made him intoxicated and induced him to sign this sale-deed and admit execution of it before the Sub-Registrar in Bombay. According to him the value of the land, which he purported to sell, was really Rs 13,000 and not Rs. 3,000. His explanation of the delay in filing the criminal complaint seems to be that he was so completely intoxicated that he had no recollection whatever of where he had been or what he had done on the occasion in question and neither he nor his relations, in spite of making inquiries, were able to discover the facts about this sale-deed until some time in February 1933.

Before the litigation began the parties exchanged notices. On 10th February the complainant sent a notice to the accused in which he set out substantially the allegations on which his criminal complaint is based and demanded the return of the sale-deed, threatening criminal or civil proceedings in case it was not returned. On 17th February the accused replied to this denying all the allegations and in their turn threatening litigation in default of possession of the land being handed over within a week. The reliefs claimed in the civil suit are a declaration of ownership of the land and possession thereof on the basis of the sale-deed. On 10th April 1933, the accused made an application to the trial Magistrate for stay of the proceedings. That was rejected by the Magistrate. On 24th April they made an application to the Sessions Court which was disposed of by the Additional Sessions Judge. He took a different view and referred the matter to this Court. I may mention that although the Magistrate refused to stay proceedings and the Additional Sessions Judge had no power to do so and this Court has made no order staying proceedings, the proceedings before the Magistrate have nevertheless been automatically stayed by reason of the fact that the record has remained in the Sessions Court.

Mr. Thakor, who appears for the complainant to oppose this reference, has raised a point of jurisdiction which I may deal with first. His argument is that the Magistrate's order declining to stay proceedings is not an order within the meaning of S. 435, Criminal P. C., and that the Additional Sessions Judge had no power to refer the matter to this Court under S. 438. He has also contended that the power to refer to the High Court given by S. 438 only exists in matters which are strictly speaking matter for revision, that is to say, matters which this Court would deal with under S. 439, and cannot be invoked in the case of a matter of stay of proceedings which this Court used to deal with under its inherent jurisdiction or power of superintendence and now deals with under the new S. 561-A of the Code. In my opinion there is no substance in this argument. I cannot see any reason why the Magistrate's order should not be held to be covered by S. 435 or why S. 438 should be limited in the manner suggested. Mr. Thakor has not in any way questioned the jurisdiction of this Court. He admits that we might act upon our own initiative or upon information derived

from whatever source. The Judge might have written demi-officially to the Registrar. In fact he decided to make a formal reference to the Court after hearing the parties. In my opinion it is no more than a question of procedure, and no point of jurisdiction really arises. I am not satisfied that there is anything wrong with the procedure which has been followed. But in any case the matter is now before the Court and we are bound to deal with it on the merits.

The question whether we ought to act upon the reference is more difficult. Several cases were cited. Almost all of these I have discussed in my judgment in the case of *In re Ramchandra Babaji* (1). I do not propose to go over the same ground again. I think the effect of the authorities may be summarised in this way. Although, generally speaking, it is not desirable that civil and criminal litigation between the same parties on substantially the same facts should go on simultaneously, the mere fact that a civil case is pending is not by itself a sufficient ground for staying criminal proceedings. The rule which was laid down in *Anna Ayyar* v. *Emperor* (2) that the defendant in a civil suit ought not to be allowed to prejudice the trial of such suit by launching and proceeding with a criminal prosecution on the same facts against the plaintiff and his witnesses has been approved by this Court, and I take it we should generally stay criminal proceedings if there were reasons to believe that they had been launched with that object. Conversely, if we saw reason to believe that a civil suit had been launched with the object of prejudicing criminal proceedings, we should not be likely to stay the latter, though we should, if necessary, stay the civil suit. In all such cases one of the matters which the Court has to consider is whether, as Patkar, J., said in *Jehangir* v. *Framji* (3), the object of the criminal proceedings is to prejudice the trial of the civil suit or to use them as a lever to coerce the accused into a compromise of the civil suit, and in that connexion the question whether the criminal complaint or the civil suit was instituted first is always important.

1. AIR 1933 Bom 307 = 1933Cr C 894=145 I C 161=34 Cr L J 900.
2. (1906) 30 Mad 226=6 Cr L J 131.
3. (1928) 112 I C 477.

The Courts have frequently drawn a distinction between public and private prosecutions and indicated that stronger reasons for staying proceedings should be required in the case of the former than in the case of the latter. That may well be, I think, because in the case of a public prosecution the intention to prejudice civil litigation is at not all likely to exist. But this is not the only test nor is priority in time necessarily conclusive. Some cases are obviously more suitable for determination by a civil Court, for instance, it is not uncommon in Bombay to have complaints of breach of trust by one partner against another. Such cases often involve the examination of complicated accounts, for which the civil Courts have better means at their disposal than criminal Courts, and indeed it may often be impossible to say whether any criminal offence has been committed until accounts of the partnership have been taken and the civil rights of the parties have been determined. In that connexion I may refer to the judgment of the learned Chief Justice in *Emperor* v. *Jagannath Raghunathdas* (4). Under such circumstances a criminal prosecution might properly be stayed, although there might be no reason whatever to infer any intention to prejudice or embarrass the civil litigation. There is no hard and fast rule in the matter. The Court has to consider the circumstances of each particular case and decide on grounds of justice and expediency whether it is proper that the criminal proceedings should be stayed, or, it may be, that the civil proceedings should be stayed or that both should be allowed to take their course.

The learned Magistrate was apparently not informed of the date on which the civil suit was filed. He assumed that it was filed after the criminal complaint and that assumption is correct. But inasmuch as the preliminaries of a civil suit naturally take longer, and as the civil suit was filed on the day next following the filing of the criminal complaint, it would seem to be unreasonable to suggest here that the civil suit was a mere attempt to counteract the criminal proceedings. The learned Magistrate's view that there is reason to believe that the civil suit has been filed with the

4. AIR 1932 Bom 57=1932 Cr C 81= 136 I C 493=33 Cr L J 317.

object of prejudicing the criminal trial, and to coerce the complainant to compromise on terms to be dictated by the accused cannot be said to be justified on the facts so far appearing. Moreover he has not considered the delay in bringing the complaint between November and March. We cannot, of course, go into the merits of the criminal complaint or of the suit. But there is no doubt that this is one of the circumstances which the complainant will have to explain. On the other hand, it appears that there has been considerable delay in filing the civil suit also. We are informed that the explanation of this is that there was an oral agreement by which the taking of possession was postponed. But this alleged oral agreement seems to have been mentioned for the first time by the accused in their application to the Sessions Judge. It was not mentioned in the notice which they sent to the complainant on 17th February.

On the whole we may say that the learned Magistrate is right so far that there seems to be at present no substantial ground for holding that the criminal complaint was filed in order to prejudice the civil suit. Nor as a matter of fact has the learned Additional Sessions Judge held this to be the case. The reasons which he has given for recommending stay of proceedings are not very easy to follow. He speaks about the necessity for a preliminary inquiry before the criminal complaint is tried. The Magistrate could, of course, have directed a preliminary inquiry if he thought that it was necessary. I think probably what the learned Judge meant was that having regard to the issues in the case the civil Court would be a more suitable tribunal than a criminal Court. At any rate it was suggested to us in the argument that the circumstances in which the sale-deed was executed and the question of the value of the land would be more likely to be satisfactorily investigated in a civil suit in which the persons concerned, including the accused in the criminal case, can be examined as witnesses and cross-examined. I think there is something in this, but at the same time what the learned Judge says about the accused taking the risk of going into the witness-box and subjecting themselves to cross-examination and so on, is only one side of the picture. The complainant also is obviously taking a risk. In the criminal case the burden of proof will be on him and the presumption will be, until it is rebutted, that the accused are innocent.

It seems to me to be difficult to say that the questions whether the complainant was drunk on 2nd November 1932, whether the consideration was paid for the alleged sale, what was the value of the land, whether there was a conspiracy or not, are not fully within the competence of the Magistrate to decide for the purposes of the criminal case. In fact the question of the existence of a conspiracy will hardly arise for determination in the civil suit in which only two of the six accused are parties. Then again there is always the point that civil proceedings normally take longer than criminal and it is not difficult to find means of delaying a decision. That is one of the matters to be borne in mind in deciding whether the ends of justice require that criminal proceedings should be stayed. If the complaint is a false one, as the accused allege, then it is likely to be thrown out before it can cause any serious delay in the disposal of the civil suit. If, on the other hand, it is a genuine case, to hold it up for several months may work injustice. The grounds for ordering a stay in this case appear to be much weaker than in any of the cases which we have been asked to consider. We doubt very much if it can be said with any confidence that any definite advantage is to be gained or any material hardship or inconvenience avoided by interfering with the ordinary course of proceedings. We therefore decline to interfere and discharge the rule.

Divatia, J.—I agree. As to the point of jurisdiction which has been urged by the learned counsel for the complainant, I do not think there is any substance in it. Under S. 438, Criminal P. C., the Sessions Judge can, on examining the record of any proceedings under S. 435, report for the orders of the High Court the result of such examination, and if he can make such report to this Court for any action to be taken by it under S. 439 of the Code in its revisional jurisdiction, I do not see why the Sessions Judge cannot make a similar report and move the High Court for interference under the Code itself under another section, viz. S. 561-A, in its inherent juris-

diction. It does not matter whether this Court interferes in its revisional jurisdiction or in its inherent jurisdiction so long as it is moved by the Sessions Judge. Therefore, I think S. 438 is not limited to the interference of the Court under S. 439, but it can interfere under the wide power which it possesses, whether under S. 439 or S. 561-A.

Then as to the merits, I agree that on the facts of this case the criminal proceedings need not be stayed. Without going into the merits of the case on both sides, it appears that neither side has satisfactorily explained the delay in launching the proceedings. The first notice was given by the complainant on 10th February and it was in reply to that notice that the opponents threatened to take civil or criminal proceedings, and, although the launching of the proceedings themselves has been practically simultaneous, it does not follow in this case that the civil proceedings should be gone into first before the criminal complaint is decided. The learned Magistrate himself is of opinion that no case is made out for stay of proceedings before him, and, although there is no hard and fast rule as to stay of criminal proceedings, on the facts of this case it cannot be said that the criminal complaint that has been filed by the complainant is launched with any motive or object in the mind of the complainant so as prejudice the civil proceedings. It would have been a different matter, if this had been a complicated matter which the civil Court would have more satisfactorily gone into than the criminal Court. But that is not the case here. I therefore think that no case is made out why the criminal proceedings should be stayed, and I agree that the rule should be discharged.

K.S. *Rule discharged.*

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* A. I. R. 1933 Bombay 489

BROOMFIELD AND DIVATIA, JJ.

Emperor

v.

Mahiji Fula—Accused.

Criminal Appeal No. 367 of 1933, Decided on 29th August 1933, from order of Sess. Judge, Kaira.

Penal Code (1860), S. 498 — "Detains" means 'keeps back"—Something in nature of control or influence is necessary—If woman has entire freedom to go wherever she likes, accused cannot be convicted under S. 498.

The word "detains" in S. 498 means by derivation and according to the ordinary use of language "keeps back" But there may be various ways of keeping back. It need not necessarily be by physical force; it may be by persuasion, or by allurements and blandishment. But there should be something in the nature of control or influence which can properly be described as a keeping back of the woman. Hence where the woman has entire freedom and accused does not obstruct her from going wherever she likes, he cannot be convicted under S. 498, as he cannot said to detain her: *Case law referred.*

[P 490 C 1, 2; P 492 C 1]

B. G. Rao—for the Crown.

H. M. Choksi—for Accused 2.

Broomfield, J.—This is an appeal by the Government of Bombay in a case in which one Mahiji Fula was convicted by the Resident Magistrate, First Class, Borsad, of an offence under S. 498, I. P. C, but was acquitted on appeal by the Sessions Judge of Kaira. The relevant facts are as follows: The complainant Shana Jhina of Amiad in Borsad taluka had a young wife named Nani. In June or July 1932 the husband left his village and went to a place in the Baroda State to earn his living, leaving his wife at home with his mother. While he was away, Kala Ranchhod, a brother of Nani, came to the complainant's house and took the girl away, and it appears that he afterwards married her by natra marriage to the accused, Mahiji Fula, who belongs to the village of Dehmi. The complainant was informed of what had occurred, and he went to Dehmi in the company of two other persons and found Nani in the house of the accused. It is alleged that when he saw them the accused came out of the house with a dharia and threatened them, whereupon they went away and returned to Amiad. It was not until 20th October 1932, that Shana Jhina filed his complaint. His explanation is that he had no money to do it before, but as no money was required that does not appear to be true.

The complaint was originally against both Kala Ranchhod and Mahiji Fula and was under Ss. 497 and 498, I. P. C., but the case against Kala Ranchhod was compromised, and, for some reason which is by no means clear to me, the learned Magistrate considered that the only charge which could stand against Mahiji Fula was one under S. 498. That

section prescribed the punishment for any person who takes or entices away any woman who is and whom he knows or has reason to be believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman. The Magistrate found that the accused had detained Bai Nani with the knowledge that she was the wife of the complainant and that he had so detained her with intent that she might have illicit intercourse with him. He accordingly convicted him and sentenced him to rigorous imprisonment for six months and a fine of Rs. 30. This conviction and sentence the Sessions Judge set aside in appeal. His judgment is a very short one and I cite the material portion, stating first by way of premise that the prosecution case is not that the accused took or enticed away the woman, nor that he concealed her in the house, but simply that he detained her with the intent specified in the section. The learned Judge says:

"It need hardly be said that unless the prosecution proves that the appellant had detained Nani with the knowledge that she might be subjected to illicit intercourse, the case against him must fail. There is absolutely nothing on record to show that the woman Nani had been detained in the house of the appellant against her wish. There is nothing to show that she was not willing to go to the house of the appellant and live there as his wife. There is absolutely no restraint placed upon her in the appellant's house, and she moves about freely, going out to fetch water or to do any other work. Thus the important ingredient which is necessary for the establishment of the offence under S. 498 is missing in this case."

The learned Government Pleader who has argued this appeal on behalf of the Crown has not seriously contested the findings of the Sessions Judge on the facts, and having perused the evidence overselves we think those findings must be accepted. There is no evidence of any sort of restraint being put upon Nani, and, although it is a little difficult to be certain as to the facts of a case in which the woman herself has not even been produced as a witness, it does appear to be the case that she was a free agent and stayed in the accused's house without any sort of compulsion and because she wished to do so. The only question that has to be considered, therefore in this appeal is whether in the circumstances stated by the learned Sessions Judge the accused can be said to have detained Nani. In that connection we have been referred to a number of authorities. In the case of *Sundara Das Tevan* (1) the Court expressed the opinion that physical constraint of the wife is not an essential of the offence made punishable by S. 498 (p. 20):

"The words of the section 'conceals or detains' may be and were, we think, intended to be applied to the enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife, for the purpose of illicit intercourse, is the gist of the offence, just as it is of the offence of taking away a wife under same section . . . and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishment."

With that expression of opinion, if I may say so with respect, I entirely agree. The word "detains" means by derivation and according to the ordinary use of language "keeps back." But there may be various ways of keeping back. It need not necessarily be by physical force; it may be by persuasion, or, as the Court said in this particular case, by allurements and blandishment. But the use of the word does, in my opinion, require that there should be something in the nature of control or influence which can properly be described as a keeping back of the woman. Further on in the same judgment the learned Judges said:

"Here there is no reasonable evidence to show that the woman had not perfect freedom to leave the house or that any allurement or persuasion was required or used to induce her to remain."

This plainly shows that the Court considered that proof of some kind of persuasion is necessary to constitute detention. We were also referred to *Queen* v. *Kumarasami* (2) and in particular to the following observations in the judgment in that case (p. 333):

"Now the section and the preceding S. (497 (a)) were evidently intended for the protection of husbands who alone can institute prosecutions for offences under them. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. If whilst the wife is living with her husband a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, that, I think, is a taking from the husband

1. (1868) 4 M H C R 20.
2. (1865) 2 M H C R 331.

within the meaning of the section. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery."

But it is to be noted that the Court was considering the meaning of the words "takes or entices away" in the section and not the word "detains," and, though one may readily agree that a person who is willing to go may nevertheless be enticed or taken, it by no means follows that a man can properly be said to detain a woman who has no desire to leave, and on the contrary wishes to stay with him. The learned Government Pleader cited the case of *Rati Ram* v. *Emperor*, *A. I. R.* 1923 *Lah.* 45. It was held there that to constitute an offence under S. 498, it is not necessary that a woman should be physically restrained or that she should be actively prevented from the exercise of her free will or action. The gravamen of the offence consists in depriving the husband of his proper control over his wife for the purposes specified in S. 498, and a detention occasioning such deprivation may be brought about by means other than mere physical constraint, e. g., even by the influence of allurements or persuasion. The case of *Sundara Dass Tevan* (1), already cited, was here followed. The facts were that a woman had been living under protection of the accused for more than two months before his arrest, and when the search party arrived with the police officers she was found concealed under a charpoy in his house. It would appear, therefore, that the accused in that case might have been convicted under S. 498 by reason of his concealment of the woman without relying upon the word "detains." But the Court also held on the evidence as follows (p. 46):

"There can be no manner of doubt that the woman was living with the petitioner with an illicit intent, and that she must have been induced or persuaded by him to withhold herself from her husband."

If the evidence justified a finding of that kind, then I agree there can be no difficulty in holding that the woman was detained according to the natural meaning of the word. But in the present case there is no such evidence. Only one other case was referred to on behalf of the Crown, *Emperor* v. *Jan Mahomed* (3). The judgment is very short and the facts do not fully appear. The Court stated (p. 435):

"The Magistrate admits that there is no direct evidence of any enticing or taking away of the girl by the accused. Even though the girl may have accompanied the accused of her own free will, the offence constituted by S. 498 would have been committed if there was satisfactory evidence to show that the accused went away with her in such a manner as to deprive her husband of his control over his wife."

It appears, therefore, that this was a case of enticing or taking away and not of detaining. On the other hand there are two cases which directly support the view which I have suggested as the correct one. First, in *Abdul Wahid Khan* v. *Emperor* (4) the expression "to detain" in S. 498 is defined as meaning to keep back from somebody or to restrain. The Court held that, as the complainant's wife had left him and gone willingly to live with the accused and the complainant did not take any steps for her recovery for many years, it could not be held that the accused had detained her within the meaning of S. 498. It was also pointed out in that case that where the facts are that a man has allowed a married woman to live in his house without any sort of compulsion, but because she desired to live with him, the offence which would be committed would be one under S. 497 and not under S. 498 of the Code.

In *Lachman Chamar* v. *Emperor* (5) the facts were that the woman was living with the accused of her own free will and had no desire to return to her husband; when the husband went to the accused's house and claimed her, she deliberately turned her back on him and walked into the house, and the accused did not then make her over to the husband. It was held that he could not be convicted under S. 498 of detaining her. The facts in the present case do not appear to be quite as strong as that. But it is in evidence that on one occasion the complainant went with the head constable, Ex. 11, to serve a summons on Bai Nani, and after the summons had been served, she returned from the chora with the accused, turning her back upon her husband, who, indeed, according to the evidence, made no attempt to persuade her to return with him. The learned Government pleader has attach-

3. (1902) 4 Bom L R 435.

4. A I R 1927 Oudh 318=103 I C 559=28 Cr. L J 703.

5. AIR 1920 All 43=56 I C 209=21 Cr L J 417.

ed great importance to the evidence of the complainant and of other witnesses examined for the prosecution who say that, when they went to the accused's house and found Bai Nani there, the accused came out with a dharia and threatened them. He argues that this conduct of the accused, by which Bai Nani was kept out of the control of her husband, and he was deprived of the custody of his wife, was enough to constitute the offence of detaining and to bring the case within S. 498. I do not agree. The conduct depcsed to by the witnesses amounts to an exclusion or obstruction of the husband, but does not in my opinion amount to a detaining of the wife. I hold for these reasons that the view taken by the learned Sessions Judge is correct and that this appeal fails and must be dismissed.

Divatia, J. — I concur. The charge against the accused in this case is that of detaining the complainant's wife Bai Nani. S. 498, I. P. C., applies to the case of taking away or enticing away a married woman with the particular intent stated in the section, or concealing or detaining her with such intent. The question in this case is whether the person who detains the wife of another person, knowing that she is the married wife of that person, is guilty of the offence under this section, even though there may be entire freedom on the part of the woman, and he does not obstruct her from going where she likes. The learned Sessions Judge is of opinion in appeal that the woman Bai Nani was not detained in the house of the appellant against her wish and that there was nothing to show that she was unwilling to go to the house of the accused and no restraint whatever had been placed upon her in the accused's house. On these facts the question would be whether, in spite of the fact that there was no obstruction against the woman the accused would be guilty of detaining her under S. 498. Now S. 498 constitutes an offence concerning a married woman, in which the proceedings would be started by the husband of the woman, who alone can file a complaint. At one time I had some doubt as to whether, in view of these facts, it cannot be said that the word "detains" in the section has reference to detention as against the husband, irrespective of the wishes of the wife, and that therefore the person who keeps the married woman in his house may be guilty under the section as against the husband, even though the woman has no physical or any other restraint placed against her.

But on a further consideration of the section I think the right view to take would be that the word "detains" should be interpreted in its natural and ordinary sense, and this can be clear if we see the scheme of the section. The act of taking or enticing away a married woman is one act and concealing or detaining her is another act. In the former act, though the woman may be perfectly willing to go with the man, the offence would occur, because it consists simply in taking or enticing away a woman without anything more. But when we come to the latter part of the section, which speaks of concealing or detaining the woman, then, in the ordinary sense of the term, the woman would be detained only if she is prevented from going in any quarter where she wants to go, and that is the construction which has been placed in the two cases that have been cited before us, in which the question was as to the consideration of the word "detains." The other authorities that have been cited have reference more to the first part of the section as to taking and enticing away than as to the second part which is concerned with the concealing or detaining, and I think therefore that taking the word in its natural sense, on the evidence it is clear that the woman was not prevented from going anywhere she liked. Therefore it cannot be said that the accused in this case is guilty of the offence with which he is charged, viz., the detention of the woman under S. 498. I therefore agree that the view of the learned Sessions Judge is correct and that the appeal must be dismissed.

K.S. *Appeal dismissed.*

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* A. I. R. 1933 Bombay 492

BROOMFIELD AND DIVATIA, JJ.

Keshav Vasudeo Kortikar — Accused —Petitioner.

v.

Emperor – Opposite Party.

Criminal Revn. Appln. No. 246 of 1933, Decided on 31st August 1933, from order of Addl. Sess. Judge, Sholapur.

(a) Criminal P. C. (1898), S. 497 — Interlocutory stage—Evidence practically justifying conviction is not necessary—Application at initial stage—Good evidence to support charge is necessary but not establishing guilt beyond doubt.

It is absurd that at an interlocutory stage bail should not be given unless the trying Magistrate has evidence before him which would practically justify a conviction. If there appear reasonable grounds for believing that the accused has been guilty of an offence of the specified kind bail should not be granted; but if the application for bail is made in an initial stage of the trial, the Magistrate may expect the prosecution to satisfy him that it is a genuine case and that they will be able to produce good prima facie evidence in support of the charge, but he cannot expect at that stage to have evidence establishing the guilt of the accused beyond reasonable doubt. [P 493 C 2]

(b) Criminal P. C. (1898), S. 497 (5) — Sessions Court has wide discretion— Court will not be strict in matter of bail in case under S. 409, Penal Code, though punishable with transportation.

Under S. 497 (5), the Sessions Court has a discretion to grant bail. The power of Sessions Court is unlimited and not fettered, as the discretion of the Magistrate is by the provisions of sub-S. (1). But the Sessions Court will naturally not grant bail in a case which comes under sub-S. (1) unless there are good grounds for doing so. There ought to be very special circumstances to justify the grant of bail in such a case. Ordinarily the Court will not be as strict in the matter of bail in the case of an offence under S. 409, Penal Code, even though it happens to be made punishable with transportation for life, as it should be in the case of offences ike murder. [P 494 C 1]

✲ (c) Criminal P. C. (1898), S 497—Trial complicated and to be protracted—Guarantee not to abscond weighs with Court.

What weighs with the Court in granting bail is the guarantee that the accused will not either abscond or obstruct the prosecution in any way. The principal ground for the grant of bail is the certainty that it must be a very protracted and complicated case. [P 494 C 2]

G. N. Thakor and *P. B. Gajendragadkar*—for Petitioner.

B. G. Rao—for the Crown.

Broomfield, J.—This is an application for bail. The applicants are three persons who are alleged to be concerned in the embezzlement of moneys belonging to minors' estates in the Sholapur District. The inquiry into the alleged defalcations began in February 1933. These applicants were arrested in May 1933. On 20th May the Magistrate released them on bail. But an application was then made to the Sessions Court under sub-S. (5) of S. 497 and the Additional Sessions Judge of Sholapur on 28th July ordered that they should be re-arrested and committed to custody. Since then they have remained in custody.

While the proceedings were going on in the lower Court no charge sheet had been submitted. It is said to have been submitted on 5th August and it appears from it that the accused are charged with offences under S. 120-B read with S. 409, I. P. C., and S. 120-B read with S. 477-A, I. P. C. But the sanction of Government is said to have been given in respect of the offence under S. 120-B read with S. 477-A and not in respect of the offence under S. 120-B read with S. 409. If that is so, then the applicants would be entitled to bail almost as a matter of course, because it is only the offence under S. 409 which is an offence punishable with transportation for life, and, therefore, comes within the terms of sub-S. (1) of S. 497, which provides that an accused person shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. Apart from that matter however as to which there may be a mistake in the charge sheet, we are of opinion that the applicants ought to be relesed on bail. We are not very greatly concerned now with the proceedings in the lower Courts. The trial Magistrate admitted the accused to bail because he thought that there was not sufficient material produced before him to enable him to hold that the accused were guilty of the alleged offences beyond reasonable doubt, and the language which he has used in his order rather suggests that he thought bail should be given unless he had evidence before him which would practically justify a conviction. That of course would be rather absurd at an interlocutory stage. We think the Additional Sessions Judge was quite right in pointing out that S. 497 (1) does not require as much as that. The accused is not to be released if there appear reasonable grounds for believing that he has been guilty of an offence of the specified kind; but if the application for bail is made in an initial stage of the trial (in this case the charge sheet had not been sent in) the Magistrate may expect the prosecution to satisfy him that it is a genuine case and that they will be able to produce good prima facie evidence in support of the charge, but he cannot

expect at that stage to have evidence establishing the guilt of the accused beyond reasonable doubt. The Additional Sessions Judge however has himself gone wrong because he appears to have considered that he himself had no discretion in the matter. He has ruled out various matters which it was open to him to consider on the question of granting bail as extraneous to the inquiry, and having found that there were reasonable grounds to believe that the accused had committed the offence he held that he was bound to grant the application and order the arrest of the accused. In our opinion he has approached the matter from a wrong point of view. He was not hearing an appeal from the order of the Magistrate. Under sub-S. (5), S. 497, he has a discretion. Having regard to S. 498, it is clear that the power of the Sessions Judge, like the power of the High Court, is unlimited and not fettered, as the discretion of the Magistrate is, by the provisions of sub-S. (1), S. 497, except of course in this sense that the Sessions Judge like the High Court will naturally not grant bail in a case which comes under the clause in question unless there are some good grounds for doing so. In fact one might go further and say that there ought to be very special circumstances to justify the grant of bail in a case of that kind although I do not consider that the Court need be as strict in the case of an offence under S. 409, even though it happens to be made punishable with transportation for life, as it should be in the case of offence, like murder.

We are of opinion that there are here very special circumstances which make it just and proper that the accused should be enlarged on bail. As I have mentioned, the inquiry has been going on since February and the accused were arrested in May and have been in custody since the end of July. The charge sheet shows that there are no less than 170 witnesses already named. The defalcations which are the subject of the case are alleged to have taken place between the years 1926 and 1931 and practically all the records of the District Court in Sholapur have been burnt. That fact will necessarily cause great difficulty to the prosecution in presenting their case and no less difficulty, one may imagine, to the defence in preparing theirs. It is quite obvious that the trial must be a very protracted one and if the accused are not enlarged on bail they will have undergone a very long term of imprisonment, whatever the result of the case may be. It appears that the investigation is now complete. We see no reason to suppose that there is any danger of the evidence for the prosecution being tampered with. The Additional Sessions Judge himself held that there was nothing in that point. One of the applicants, accused 1, is a man of 55 years of age and having been Deputy Nazir may perhaps be regarded as a man whose position affords some guarantee that he will not either abscond or obstruct the prosecution in any way. The principal ground for the grant of bail however is the certainty that it must be a very protracted and complicated case. That in itself, we consider, would under the circumstances justify the release of the applicants on the very substantial bail which was required from them by the trial Magistrate. We direct therefore that the applicants be admitted to bail on the same terms as before.

R.K. *Bail granted.*

A. I. R. 1933 Bombay 494

BROOMFIELD AND DIVATIA, JJ.

Emperor

v.

Sher Alam Khan Sahib—Accused.

Criminal Ref. No. 70 of 1933, Decided on 11th September 1933, from order of Addl. Sess. Judge, Ahmedabad.

(a) Penal Code (1860), Ss. 477 and 30—Document destroyed must amount to valuable security—Administrative order of Court is not valuable security.

In order that the accused may be prima facie guilty of the offence under S. 477, the document destroyed must amount to a valuable security. An administrative order of the Court by which the Nazir is asked to take a document of suretyship from accused for his being released on bail is not a valuable security and hence destruction of such an order is not offence under S. 477. [P 495 C 1]

(b) Criminal P. C. (1898), S. 215—While questioning commitment, High Court can pass subsequent order directing Magistrate to make further enquiry.

Section 215 empowers the High Court to quash an order of commitment on a point of law, but it does not, in any way, restrict the power of the High Court to pass any subsequent order after the commitment is quashed. Hence while quashing the commitment on a particular charge,

the High Court can direct the Magistrate to go back to the point at which he took cognizance of the complaint, and conclude the trial himself: *A I R* 1929 *Cal* 756 (*FB*), *Rel on*; 21 *I C* 897, *Ref.* [P 495 C 2]

H. D. Thakor—for Accused.

Divatia, J.—This is a reference made by the Additional Sessions Judge at Ahmedabad recommending that the committal of the accused to the Sessions Court on a charge for an offence under S. 477, I. P. C., should be quashed. The accused was charged before the Honorary First Class Magistrate at Ahmedabad under S. 477, I. P. C., for having destroyed documents which were alleged to be valuable security, and the learned Magistrate being of opinion that there was a prima facie case against the accused with regard to the offence charged against him, passed an order committing the accused to the Court of Session for trial under S. 477, I. P. C. The offence alleged to have been committed by the accused consists in his destroying an order of the Court by which the Nazir of the Court was asked to take a document of suretyship from the accused for his being released on bail and the necessary certificate for the solvency of the surety was to be taken. It is this order signed by the Superintendent and addressed to the Nazir that is alleged to have been destroyed by the accused along with two draft affidavits and a certificate given by a pleader. Now, in order that the accused may be prima facie guilty of the offence under S. 477, I. P. C., the document destroyed must amount to a valuable security. "Valuable security" has been defined under S. 30, I. P. C., which says that it must mean

"a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right."

It cannot be said that this administrative order of the Superintendent addressed to the Nazir by itself created any legal right in favour of the Nazir much less the two draft affidavits made by certain persons. Therefore, the learned Sessions Judge's recommendation that the offence with which the accused is charged does not fall under S. 477, I. P. C., is correct, and in that view of the case, the committal by the learned Honorary Magistrate on that ground cannot be sustained, and under S. 215, Criminal P. C., we quash this commitment on a point of law, which in this case is that no offence has been made out on the facts under S. 477, I. P. C.

Mr. H. D. Thakor, appearing for the accused in this case, has urged that the recommendation of the learned Additional Sessions Judge to the effect that after the commitment was quashed, the case should be sent to the District Magistrate to arrange for a trial by a competent Magistrate is not correct, and he says that once the order of committal is quashed, the Magistrate who heard the complaint has no further jurisdiction, and that therefore the only order to be passed after the commitment is quashed is that the accused should be discharged. This argument is not correct. S. 215 empowers the High Court to quash an order of commitment on a point of law, but it does not, in any way, restrict the power of this Court to pass any subsequent order after the commitment is quashed. On the contrary, there is a recent ruling of the Calcutta High Court in the case of *Emperor* v. *Girish Chunder Kundu* (1). There the Full Bench decided that while the primary effect of the order quashing the commitment was to supersede any action taken by the Magistrate under S. 210 and his proceedings subsequent thereto, it was necessary for the Magistrate to go back to the point at which he took cognizance of the complaint, that there was no need for a fresh complaint and that the Magistrate was to begin the trial afresh under S. 252, Criminal P. C. That view is, no doubt, correct, and in our own High Court also after an order is made quashing the commitment, the subsequent order that is passed is that the matter should be sent back to the Magistrate who would conclude the trial before him. As an instance of this kind of order, I may refer to the case of *Emperor* v. *Asha Bhathi* (2), in which after the order for commitment was quashed, it was directed that under S. 254, Criminal P. C., it was the Magistrate's duty to frame in writing a charge against the accused and then to proceed as described in S. 256 and the following sections, and the final order was that the commitment

1. AIR 1929 Cal 756=1929 Cr C 468=123 I C 483 (FB).
2. (1913) 14 Cr L J 657=21 I C 897.

was quashed and the Magistrate should conclude the trial himself.

It is urged here that the effect of quashing the order of committal is that there is no charge against the accused under S. 477, I. P. C. That however does not mean that the accused should be discharged entirely although he may not be guilty of an offence under this particular section. When the Magistrate has taken cognizance of this offence, then he has inquired into the offence, and if he finds that on the evidence in the case the accused is guilty of an offence, which would fall under a different section, then it would be his duty to convict the accused of that offence. Under S. 209, Criminal P. C., it is provided that the Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge the accused, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly. This would mean that wherever the committal of an accused person to the Court of Session is not justified, then in that case the Magistrate has to see whether on the complaint and on the evidence that is adduced by the complainant the accused would be guilty of any offence, and that he has to charge the accused of that offence of which he finds him to be guilty, and it would be proper for him to convict him accordingly.

I therefore think that the order of the learned Additional Sessions Judge in this case is proper and that, as observed by this Court in *Emperor* v. *Asha Bhathi* (2), the proper order here would be that this commitment is quashed and that the Magistrate should conclude the trial himself. This reference is therefore accepted. The papers should go to the trial Magistrate for disposal according to these remarks.

Broomfield, J.—I agree.

K.S. *Reference accepted.*

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